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No. 99-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CLAUDE CIMINO, ET AL.,

Petitioners,

v.

PITTSBURGH CORNING CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Judicial Panel on Multidistrict Litigation may direct the transfer of cases pending in a federal district court even when:

- those actions are already in trial;
- the common questions of fact and law have already been resolved in a prior phase of the proceeding; and
- any remaining discovery or other pretrial matters involve individualized questions of fact that plainly should not be conducted in the multidistrict context.

PARTIES TO THE PROCEEDING

The plaintiff in the district court (petitioner in the court of appeals) was Claude Cimino, on behalf of group of 2,280 similarly situated plaintiffs in the Eastern District of Texas.

The defendant below (respondent in the court of appeals) was the Pittsburgh Corning Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Claude Cimino, *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals (App. 1a-8a) is unreported. The transfer order of the Judicial Panel on Multidistrict Litigation (App. 9a-11a) is unreported. The case management order of the Eastern District Court of Texas (App. 12a-15a) is unreported.

JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1367. The court of appeals had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1407(e), 1651(a). Petitioners' timely filed petition for rehearing and suggestion for rehearing en banc was denied on September 9, 1999. App. 16a-17a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1407(a) provides:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation

> authorized by this section upon its determination that transfers for such proceedings will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

STATEMENT OF THE CASE

This case follows up on the issue decided by this Court in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956 (1998). This case presents the question of whether the Judicial Panel on Multidistrict Litigation may direct the transfer of cases pending in one federal district court to a different federal district court even when:

- those actions are already in trial;
- the common questions of fact and law have already been resolved in a prior phase of the proceeding; and
- any remaining discovery or other pretrial matters involve individualized questions of fact that should not be conducted in the multidistrict context.

This question raises a fundamental issue of federal judicial power under the multidistrict litigation statute, 28 U.S.C. § 1407(a). If multidistrict transfers are permitted in circumstances as extreme as those in this case, there are no effective limits on the power of the Judicial Panel on Multidistrict Litigation to order the transfer of pending cases, even when they are already

in trial. The statutory limits imposed by Congress will be rendered nugatory.

Thus, in this case Chief Judge Becker indicated that he would have granted rehearing en banc on the ground that "the Judicial Panel on Multidistrict Litigation abused its discretion in determining that there were common questions of fact whose resolution would be served by the transfer of the *Cimino* cases to the transferee court." App. 16a-17a n.2. He opined that "the only causation questions remaining [are] those relating to individual damages determinations." *Id.*

This Court should do in this case precisely what it did in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956 (1998): reject the abusive and ever-expanding use of the MDL process in which some lower courts have engaged and reaffirm the important statutory limits imposed by Congress.

This case is a particularly appropriate vehicle to reaffirm the fundamental limits on multidistrict transfers because the decision in this case conflicts with numerous other lower court decisions in the MDL context. Further, this proceeding is characterized by a remarkable conflict among decisions *in the very same case* by the Eastern District of Texas, the Fifth Circuit Court of Appeals, the Judicial Panel on Multidistrict Litigation, and the Third Circuit Court of Appeals. In essence, the Multidistrict Panel and the Third Circuit have pulled out the rug from underneath pending proceedings in the Eastern District of Texas, by purporting to reinterpret a decision of the Fifth Circuit Court of Appeals. The Third Circuit has precipitated an unseemly and unjustifiable jurisdictional tug of war.

This Court's plenary review is urgently needed.

Procedural Background

This case involves 2,280 products liability asbestos cases, which have languished in the federal courts for over a decade. The bulk of the cases were filed in the Eastern District of Texas

in 1987, and all cases were filed in that District prior to February 1, 1989. The Eastern District of Texas held a jury trial on the liability portion of the claims in 1990. The district court entered judgments in 1993. The Fifth Circuit heard oral argument on the defendant's appeal in 1995. It did not render its decision until 1998. More than 720 of the plaintiffs have died in the intervening years since trial.

The cases have now been transferred to the Eastern District of Pennsylvania as part of the multidistrict process. The remaining plaintiffs are entitled to a transfer of these cases back to the Eastern District of Texas for a prompt resolution of their claims, for the Texas district court was in the midst of implementing a trial plan, providing for mini-trials beginning in May 1999, at the time the transfer order was issued.

1. The Original Trial Plan.

On October 26, 1989, the U.S. District Court for the Eastern District of Texas entered an order consolidating 3,031 cases under Fed.R.Civ.P. 42(a) for a single trial on the issues of state of the art and punitive damages and certifying a class action under Rule 23(b)(3) for the remaining issues of exposure and actual damages. The consolidation and certification included all pending suits in the Beaumont Division of the Eastern District of Texas filed as of February 1, 1989, by insulation workers and construction workers, survivors of deceased workers, and household members of asbestos workers who were seeking money damages for asbestos-related injury, disease, or death.

Phase I was a single consolidated trial proceeding which decided the state of the art and punitive damages issues. The district court explained that:

> the jury will be asked to decide issues such as (a) which products, if any, were asbestos-containing insulation products capable of producing dust that contained asbestos fibers sufficient to cause harm in its application, use, or removal; (b) which of the Defendants' products, if

> any, were defective as marketed and unreasonably dangerous; (c) when each Defendant knew or should have known that insulators or construction workers and their household members were at risk of contracting an asbestos-related injury or disease from the application, use, or removal of asbestos-containing insulation products; and (d) whether each Defendant's marketing of a defective and unreasonably dangerous product constituted gross negligence. In answering issue (d), the Jury will hear evidence of punitive conduct including any conspiracy among the Defendants to conceal the dangers (if any) of asbestos.

Quoted in *In re Fibreboard*, 893 F.2d 706, 708 (5th Cir. 1990). By order of December 29, 1989, the district court provided that "the jury may be allowed to formulate a multiplier for each defendant for which the jury returns an affirmative finding on the issue of gross negligence."

Phase II of the original trial plan would have determined causation issues. In Phase III, damages were to be determined for some of the plaintiffs, and, in addition, damages figures were to be provided for extrapolation to other plaintiffs.

The defendants sought mandamus before the Fifth Circuit, attacking "the district court's efforts to try these cases in a common trial." *In re Fibreboard*, 893 F.2d at 707. The Fifth Circuit invalidated the proposed Phase II under due process, the Seventh Amendment, and the *Erie* doctrine, but expressly held that "[w]e find no impediment to the trial of Phase I should the district court wish to proceed with that trial." *Id.* at 712.

2. The Phase I Trial.

After the Fifth Circuit's decision, in 1990 the district court held an eight-week jury trial on the Phase I issues. The defendants then remaining were Carey Canada, Celotex, Fibreboard, and Pittsburgh Corning. The jury was asked to answer 17 separate questions. The first four questions asked

when the defendants knew or should have known that their "asbestos-containing insulation products" posed a risk of asbestos-related disease to "insulators," to their household members, to other "crafts working with or near insulation products," and to their household members. The jury found that Pittsburgh Corning knew or should have known this since 1962 (when it first entered the business) as to both insulators and other crafts; the other three defendants since 1935 as to insulators and since 1955 as to other crafts; all four defendants as to both sets of household members since 1965. In answer to question 5, the jury found that, since 1962 as to Pittsburgh Corning and since 1935 as to the other defendants, the defendants' listed insulation products "were defective and unreasonably dangerous as a result of not having an adequate warning." In question 7, the jury found each defendant guilty of gross negligence warranting punitive damages and assigned a punitive damages multiplier of $3.00 per $1.00 of actual damages to Pittsburgh Corning, $2.00 to Celotex, and $1.50 each to Fibreboard and Carey Canada. *See Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 304 (5th Cir. 1998).[1]

Thus, the Phase I jury verdict established, with respect to all 2,280 plaintiffs whose cases are the subject of this proceeding, that:

· Pittsburgh Corning knew or should have known in 1962 that its asbestos-containing products posed a risk of asbestos-related disease, *and*

· Pittsburgh Corning's asbestos-containing products were defective and unreasonably dangerous, *and*

· Pittsburgh Corning's warnings were inadequate, *and*

· Pittsburgh Corning was grossly negligent, *and*

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[1] Questions 8 through 17 separately addressed the individual cases of each of 10 class representatives. For these 10 plaintiffs, Phase I represented a complete jury trial of their entire individual cases.

· Pittsburgh Corning should pay as punitive damages 3 times the amount of actual damages awarded to each plaintiff.

In a series of rulings both before and after the Phase I trial, the district court made clear that the class-wide findings would be binding on the defendants with respect to all plaintiffs. *See* Order and Notice of Oct. 26, 1989; Order and Memorandum of Mar. 13, 1990; Order of Nov. 21, 1990; Order of Mar. 5, 1991. *See also Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 653 (E.D. Tex. 1990) (Phase I "resolve[d] all common issues," including "[t]he question of punitive damages *in the entire case* of the 2,298 class [members]") (emphasis added).

On February 19, 1990, the district court certified a class under Fed. R. Civ. P. 23(b)(3) consisting of 2,298 plaintiffs with pending cases in the Eastern District of Texas. The Order of certification was directed to Phase I. *See* 2/19/90 Memorandum and Order at 12; 751 F. Supp. at 653. Pursuant to Rule 23(c)(2), notice was provided to all plaintiffs in pending suits in the Beaumont Division in the Eastern District of Texas, filed as of February 1, 1989, by insulation workers and construction workers, craftsmen working with or near insulation products, survivors of deceased workers, and household members of workers exposed to asbestos.

On March 13, 1992, the district court entered a Final Consolidated and Class Action Judgment "to comply with the requirements of Rule 23(c)(3)." The district court explained that "Phase I involved not only the trial of the ten (10) class representatives' cases on all issues, but also the determination of the common issues of state of the art and punitive damages. The Phase I jury, along with establishing punitive damage multipliers, specifically decided whether each asbestos-containing insulation product manufactured by each defendant was defective and unreasonably dangerous, the adequacy of warnings, the state of the art defense, and the fiber type defense." The district court noted that orders had been entered with respect to all 2,298 plaintiffs.

3. The Phase II and Phase III Proceedings.

Following completion of the Phase I trial, the district court proceeded into a damages phase (Phase III) for 160 sample plaintiffs drawn from each of five different asbestos-related diseases. The court instructed the jury that it was to assume exposure was sufficient to be a producing cause of all the disease categories. *See Cimino*, 151 F.3d at 304-05.[2] The jury rendered 12 zero verdicts and 148 damages verdicts in the sample cases. The district court ordered remittiturs in 35 of these cases and calculated an average actual damages award for each asbestos disease category, after remittitur and considering the zero verdicts. The court intended to extrapolate these figures to the remaining 2,128 cases. *Id.* at 306.

Following a one-day bench hearing, the district court determined that in each disease category the 160 sample cases were reliably representative of the cases involving the like disease among the remaining 2,128 cases. The court ruled that each of these remaining 2,218 cases (the "extrapolation cases") would be assigned to one of the five disease categories, and each plaintiff would be entitled to judgment based on an amount of actual damages equal to the average of the verdicts rendered in those of the 160 sample cases involving the same disease category. Punitive damages were assessed on the basis of the Phase I verdict. *Id.* at 309.

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[2] Phase II, the causation and exposure phase, had been dispensed with on the basis of a stipulation (reserving the defendants' Seventh Amendment and related objections) providing that "it shall be deemed that the Phase Two jury" assigned in all instances the following comparative causation shares, viz: Pittsburgh Corning, ten percent; Fibreboard, ten percent; Celotex, ten percent; and Manville Personal Injury Settlement Trust, thirteen percent. *Id.* at 307. This stipulation formed the basis for judgments entered on an extrapolation basis.

After the Fifth Circuit's 1998 decision, this stipulation became a nullity.

4. The Fifth Circuit's 1998 Decision.

On appeal, the Fifth Circuit held that the extrapolation process in Phase III of the trial violated the Seventh Amendment and Texas law insofar as it did not provide individualized determinations of exposure and damages. Accordingly, the court of appeals reversed the judgments in the 143 Phase III cases and in all five extrapolation cases before it, and remanded those cases for further proceedings to determine individual issues of exposure, causation, and (for those plaintiffs whose individual damages had not been tried in Phase III), damages. The Fifth Circuit expressly held, with respect to the 143 Phase III plaintiffs, that "[i]n these cases, the trial plan was adequately individualized and preserved Seventh Amendment rights with respect to each individual's actual damages from an asbestos-related disease. . . . It was strictly a damages trial as to those individual plaintiffs." 151 F.3d at 315. The court of appeals thus indicated that, as to such plaintiffs, any further proceeding could be limited to the issue of exposure.

Moreover, the Fifth Circuit expressly reaffirmed the propriety of the Phase I class-wide verdicts. It remanded the class representatives' cases only for the limited purpose of the calculation of prejudgment interest. The court of appeals held that Phase I was not only "a complete jury trial of the entire individual cases of the ten class representatives," but "also *a class-wide determination* of issues of product defectiveness, warning, and punitive damages (including a multiplier as to each defendant)." *Cimino v. Raymark Indus., Inc.*, 151 F.3d at 299-300 (emphasis added). The Court of Appeals reaffirmed (*see id.* at 302 & n.10) that Phase I was nothing more than the *class-wide* adjudication of liability issues it had approved in *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471 (5th Cir. 1986) ("common questions" would be "resolved *for the class*") (emphasis added), and *In re Fibreboard*, 893 F.2d 706 (5th Cir. 1990), where the Fifth Circuit approved "a single trial" for all plaintiffs on liability issues. 893 F.2d at 708.

Hence, the Fifth Circuit affirmed the unanimous Phase I jury findings, declaring "we reject all of [Pittsburgh Corning's] contentions on appeal except that relating to the date on which prejudgment interest commences to accrue." 151 F.3d at 335. The court of appeals expressly rejected Pittsburgh Corning's objection to the punitive damage multiplier:

> The use of a multiplier to determine punitive damages is likewise challenged by Pittsburgh Corning. However, our decisions in *Jenkins* and *Fibreboard* mandate rejection of that challenge. It is also contended that the multiplier of three that the jury assigned to Pittsburgh Corning is excessive, both generally and as a matter of due process. We reject this contention.

Id. at 323.

5. The Texas District Court's Plan for Completing the Trials.

After the Fifth Circuit's 1998 decision, the U.S. District Court for the Eastern District of Texas entertained extensive briefing and argument on the meaning of the decision and the proper disposition of the remaining plaintiffs' claims. On December 2, 1998, the district court issued an initial case management order to outline its plan for completing the remaining trials.

The district court observed that, "[a]lthough the Court of Appeals disapproved of the extrapolation procedure which was used by this court, the opinion by the Appeals Court did approve of the phase I class-wide determination of issues of product defectiveness, warning, and a punitive damages multiplier." App. 12a. "[B]ecause the phase I class-wide findings were not disturbed by the Court of Appeals' decision, what remains for this court are shortened mini-trials on causation and damages in 2,218 cases and on causation and perhaps damages [i]n 143 cases. *The phase I or liability part of the trial of all of these cases has been completed.*" App. 13a (emphasis added).

The district court noted that "Pittsburgh Corning has

suggested to the Judicial Panel on Multidistrict Litigation that these cases should be consolidated with MDL 875 as tag-along cases." App. 13a-14a. "However, assuming these cases remain in this district for completion of the trials, this court is prepared to begin the process of trying these cases in groups using the procedures approved in *Jenkins v. Raymark Industries*, as soon as possible." App. 14a.

The district court made arrangements for the prompt completion of the trials in all of the remaining cases, focusing the on the use of mini-trials of four to ten plaintiffs — an approach that the Fifth Circuit had endorsed in *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986); *see also Cimino*, 151 F.3d at 301 n.8. The district court ordered counsel for all parties to meet and confer in a good faith attempt to agree on a trial plan. App. 14a. The district court opined that "[t]he trial plan should include any additional discovery that may be warranted, such as updated medical records and expert reports and discovery into the circumstances of exposure. Discovery shall occur on a rolling basis and be focused on each group of plaintiffs as the dates for mini-trials approach." App. 14a.

The district court instructed that, "[a]t the conclusion of discovery for each mini-trial group of plaintiffs, those cases shall be referred to a qualified attorney mediator for mediation. Counsel are encouraged to agree upon the name of an attorney mediator. If counsel are unable to agree, the court will designate a mediator." App. 14a.

The district court further directed that, "[f]or those cases that do not settle through mediation, the court desires to conduct mini-trials in groups of eight plaintiffs. That number may be increased to ten after the completion of a few trials. Counsel shall discuss and endeavor to reach agreement on a fair method for selecting plaintiffs for group trials. . . . [T]he plaintiffs who are grouped together in each mini-trial should insofar as possible come from the same work sites and similar crafts in order to expedite the presentation of evidence on exposure." App. 14a.

The district court ordered that the proposed trial plan be structured in a manner that would have scheduled the first mini-trial in May 1999 and the second mini-trial in June 1999. App. 15a. The district court announced that, thereafter, it would "conduct two mini-trials per month in separate courtrooms, provided that the two district judges involved are able to attend to the other demands of their dockets." App. 15a.

6. The MDL Transfer Order.

The district court's efforts to resolve the remaining issues in an orderly fashion were short-circuited by a transfer order issued in Docket No. 875 by the Judicial Panel on Multidistrict Litigation on February 5, 1999, transferring the cases to the Eastern District of Pennsylvania. The order was issued with the support of defendant Pittsburgh Corning, over the petitioners' strenuous objection.

The transfer order was premised on the erroneous assumption that the cases were "in a pretrial status." App. 10a. The Panel on Multidistrict Litigation further maintained that the cases involved "common questions of fact" with actions previously transferred to the Eastern District of Pennsylvania and that transfer would "serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." App. 9a. The Panel on Multidistrict Litigation also considered factors wholly foreign to Section 1407, including "the impact that scheduling of trials in the Texas forum would have on MDL-875 settlement efforts, MDL-875 settlement funding and the timing of remand of actions for trial." App. 10a. The Panel on Multidistrict Litigation brushed off petitioners' objections to transfer with the suggestion that "[t]o parties that believe their situation renders inclusion of their action in MDL-875 unnecessary or inadvisable, we note that whenever the transferee judge deems remand of any claims or actions appropriate, procedures are available whereby this may be accomplished with a minimum of delay." App. 10a-11a.

7. The Third Circuit's Decision.

On petition for a writ of mandamus, the Third Circuit upheld the Panel on Multidistrict Litigation's transfer order. The Third Circuit saw no effective limit to the MDL transfer power.

With respect to the absence of common issues, the Third Circuit simply overrode the holdings of the Eastern District of Texas and the Fifth Circuit that the common issues of fact in this case had been resolved by the Phase I findings. The Third Circuit insisted that "[t]here remain many common questions of fact in the *Cimino* cases" and there also "remain many common important matters of law, further justifying transfer." App. 6a. The Third Circuit explained that "[t]he Multidistrict Panel interprets the 'common questions of fact' requirement broadly, and will even transfer cases that involve common important or dispositive questions of law, in addition to the existence of some common questions of fact." App. 5a. The Third Circuit added that "Subsection 1407(a) 'does not require that there be strict identity of issues or a predominance of common questions or that they be central to or determinative of the controversy in order to justify transfer.'" App. 6a (citation omitted).

Next, the Third Circuit held that the convenience of the parties justified transfer. The Third Circuit ignored that the fact that any remaining discovery in the instant cases would entail highly individualized issues, such as exposure and damages, of no relevance to the great mass of cases in MDL-875. The Third Circuit tersely announced that "the broader group will benefit from consolidated treatment." App. 7a.

The Third Circuit also opined that judicial efficiency would be served by the transfer. The Third Circuit did not mention the Eastern District of Texas' announced plan for mediation and mini-trials beginning in May 1999. The Third Circuit simply assumed that Judge Weiner in the Eastern District of Pennsylvania would do a better job.

Petitioners sought rehearing before the Third Circuit, which

was denied. Chief Judge Becker indicated that he would have granted rehearing en banc on the ground that "the Judicial Panel on Multidistrict Litigation abused its discretion in determining that there were common questions of fact whose resolution would be served by the transfer of the *Cimino* cases to the transferee court. He sees the only causation questions remaining as those relating to individual damages determinations." App. 16a-17a n.2.

REASONS FOR GRANTING THE WRIT

The transfer order in this case represents both a clear abuse of discretion and a usurpation of judicial authority. It also thwarts important interests in justice and judicial economy. The common issues of product defect, inadequate warnings, gross negligence, and punitive damages have already been decided in these cases by the Phase I jury verdicts. The Chief Judge of the Eastern District of Texas developed a trial plan that would ensure completion of the trials "as soon as possible," beginning in May 1999. App. 14a. The Third Circuit's decision ran roughshod over the Phase I jury verdicts and the trial plan formulated by the Eastern District of District.

This Court's review is urgently needed for several reasons. First, the decisions by the Judicial Panel on Multidistrict Litigation and by the Third Circuit conflict with numerous decisions in the lower courts on when transfer may be ordered. Indeed, the Third Circuit's decision here cannot be reconciled with its own prior ruling in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997), which underscored the individual nature of causation and damages issues in asbestos litigation, even in the settlement context. As Chief Judge Becker opined, in explaining that he would have granted rehearing en banc, "the Judicial Panel on Multidistrict Litigation abused its discretion in determining that there were common questions of fact whose resolution would be served by

the transfer of the *Cimino* cases to the transferee court. . .. [T]he only causation questions remaining a[re] those relating to individual damages determinations." App. 16a-17a n.2.

Second, the Third Circuit's ruling creates an effective conflict with previous decisions in this very case by the Fifth Circuit and the Eastern District of Texas. In effect, the Third Circuit has simply elbowed the federal courts in Texas out of the way and seized these cases for itself and the Eastern District of Pennsylvania.

Third, the Third Circuit permitted the Judicial Panel on Multidistrict Litigation to consider, as a reason for ordering transfer of *these* cases, the possibility of facilitating settlement of *other* cases in MDL-875. This factor was wholly impermissible under the governing statute, 28 U.S.C. § 1407.

There is a central theme uniting all of the various reasons for granting certiorari: the unprincipled expansion of judicial power by the Judicial Panel on Multidistrict Litigation. 28 U.S.C. § 1407(a) authorizes MDL treatment only for cases which have not yet gone to trial — not for half-completed actions like those at issue here. "Congress, in enacting Section 1407, presumably mindful of the deference traditionally accorded to the plaintiff's choice of forum, limited the power of the Multidistrict Panel to the transfer of pre-trial proceedings. . . . [T]ransfer under Section 1407 is solely for purposes of pretrial proceedings . . . ." 15 WRIGHT, MILLER AND COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3862 (2d ed. 1986 and 1998 Supp.) (internal quotation omitted). Indeed, the Panel on Multidistrict Litigation's original decision in Docket No. 875 recognized that "[t]he Panel's authority under § 1407 is to transfer for pretrial proceedings; actions on Schedule A that have been resolved or are presently in trial are not intended to be within the scope of the Panel's transfer decision." *In re Asbestos Prod. Liab. Litig.*, 771 F. Supp. 415, 424 n.11 (J.P.M.L. 1991).

The decisions of the Judicial Panel on Multidistrict Litigation

and of the Third Circuit in this case reflect the same MDL process run riot as that condemned by this Court in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956 (1998). There, in the course of disapproving of the wide-ranging use of the multidistrict process in which some lower courts have engaged in recent years, this Court held that a district court conducting such pretrial MDL proceedings may not assign a transferred case to itself for trial. In doing so, this Court noted that the Ninth Circuit found that such transfers were "conducive to efficiency," *id.* at 960; that Rule 14(b) of the Rules of the Judicial Panel on Multidistrict Litigation had endorsed the practice; and that noted commentators and many lower courts had approved it. 118 S. Ct. at 961. Nonetheless, this Court held that the statute limits a transferee court's authority to the conduct of "coordinated or consolidated" proceedings and to those cases that are "pretrial." This Court cited legislative history indicating that § 1407 was not intended to affect the venue of cases already in trial:

> The proposed statute affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes.
>
> * * *
>
> The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings.

H.R. Rep. No.1130, 90th Cong., 2d Sess., p. 4 (1968).

The Third Circuit's decision in this case abrogated the very same statutory limit.

A. The Third Circuit's Decision Conflicts with

Numerous Other Decisions in the Lower Courts.

The transfer order is this case involves actions already in trial as to which the liability phase had already been completed in an eight-week 1990 trial. The Texas district court observed that, "[a]lthough the Court of Appeals disapproved of the extrapolation procedure which was used by this court, the opinion by the Appeals Court did approve of the phase I class-wide determination of issues of product defectiveness, warning, and a punitive damages multiplier." App. 12a. "[B]ecause the phase I class-wide findings were not disturbed by the Court of Appeals' decision, what remains for this court are shortened mini-trials on causation and damages in 2,218 cases and on causation and perhaps damages [i]n 143 cases. *The phase I or liability part of the trial of all of these cases has been completed.*" App. 13a (emphasis added).

The Phase I findings, which have been affirmed on appeal, establish that Pittsburgh Corning's asbestos-containing products were defective and unreasonably dangerous; that its warnings were inadequate; that the company knew or should have known in 1962 that its products posed a danger of asbestos-related disease; and that it was grossly negligent. A punitive multiplier in the amount of three times actual damages has already been established. In a very real sense, the trials in this case are already half done.

Further, the jury's verdicts conclusively resolve any "common questions of fact" that the cases might share with actions already coordinated or consolidated in Docket No. 875 for pretrial purposes. Any supposed common questions of fact would pertain to questions of liability — product defect, adequacy of warnings, and so on — which have *already been resolved* by the Phase I findings in these cases. Indeed, the Judicial Panel previously recognized, in commencing the asbestos products liability multidistrict proceeding, that "the principal area common to all actions [would be] the state of medical and scientific knowledge at a particular time regarding the health hazards posed

by exposure to asbestos." *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 417 (J.P.M.L. 1991); *see also In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 910 (J.P.M.L. 1977) ("the only questions of fact common to all actions relate to the state of scientific and medical knowledge at different points in time concerning the risks of exposure to asbestos").

The state-of-the-art and similar issues have already been resolved by the Phase I trial in these cases. The sole remaining questions relate to exposure and, for some plaintiffs, damages. *See Cimino*, 751 F. Supp. at 665 ("*Cimino* was a trial in the traditional sense. The 373 Orders entered and the numerous other rulings were the product of judicial opinion, not calculations. The liability verdicts and 160 damage awards were made by three juries in a traditional trial.").

Thus, it is plain that the "common questions" requirement cannot be met in this proceeding. Any additional discovery that may be needed, such as "updated medical records," App. 14a, or individual exposure data, will not involve any issues in common with asbestos cases consolidated in the Eastern District of Pennsylvania. Any further discovery that may be needed in this proceeding will relate to individualized questions of exposure and damages. Moreover, such discovery should occur in Texas, not in Pennsylvania. It should not be undertaken in coordinated or consolidated pretrial proceedings.

The Third Circuit ignored these considerations. It insisted that, "[a]side from the factual issues, there remain many important matters of law, further justifying transfer." App. 6a. Yet § 1407(a) expressly refers to questions of "fact," not of *law*, and it would obliterate Congress' handiwork to hand the MDL panel a blank check to transfer cases on the basis of *legal* rather than *factual* similarities.

Accordingly, the Third Circuit's judgment in this case conflicts with numerous other decisions in the lower courts.

Indeed, the Third Circuit's judgment conflicts with its own prior decision in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997), where the Third Circuit rejected a mass settlement in an asbestos case and explained that the common issues in asbestos cases are limited to: the "capacity of asbestos to cause disease" (although that question was resolved implicitly in Phase I of the trial in this proceeding); whether the defendants had knowledge of the hazards of asbestos (resolved conclusively in Phase I of the trial in this proceeding); whether the defendants adequately tested their asbestos products (resolved conclusively in Phase I of the trial in this proceeding); whether the warnings accompanying the defendants' products were adequate (resolved conclusively in Phase I of the trial in this proceeding). *Georgine*, 83 F.3d at 626. Questions of causation and damages raise *individualized* issues rather than *common* issues. Indeed, it is for that very reason that — as the Third Circuit observed in this case — "the use of the class action device to settle asbestos cases has been questioned in several recent Supreme Court opinions." App. 6a n.2.

Pittsburgh Corning itself has stressed that the exposure and causation issues are highly individualized and must be analyzed plaintiff by plaintiff. In its response to Plaintiffs' trial plan filed in the Eastern District of Texas, Pittsburgh Corning argued that "proof of injury" is an "individualized and independent" process. Quoting this Court's decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), Pittsburgh Corning contended that "[c]lass members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma. . . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry." "The plaintiffs' claims for compensatory and punitive damages must therefore focus almost entirely on facts and issues specific to individuals rather than the class as a whole." "[I]ndividual issues

includ[e] proximate causation, comparative negligence, reliance, and compensatory damages." Pittsburgh Corning's Response to Plaintiffs' Proposed Trial Plan at 9, 10 & n.25 (filed Nov. 5, 1998).

Hence, the decisions of the Third Circuit and of the Panel on Multidistrict Litigation fly in the face of numerous rulings in the lower courts. "[I]mplicit in the common question requirement is the notion that it should be more economical or convenient to conduct pretrial proceedings on the common issues in one forum." 15 WRIGHT, MILLER AND COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3863 (2d ed. 1986 and 1998 Supp.). "A transfer under the multidistrict litigation statute is appropriate only if two or more civil actions raise one or more common questions of fact. If the degree of commonality among the actions does not rise to a level such that a transfer would serve the overall convenience of the parties and witnesses and promote the just and efficient conduct of the entire litigation, the transfer will be denied. . . . [T]he party moving for a transfer [is required] to show that any common questions of fact are so complex, and the accompanying discovery so time-consuming, that the advantages of combining the actions for coordinated or consolidated pretrial proceedings overcomes the inconvenience to some of the litigants and their witnesses in the actions whose transfer is being considered." 17 MOORE'S FEDERAL PRACTICE § 112.05 (3d ed. 1997). *See also In re Asbestos School Prods. Liab. Litig.*, 606 F. Supp. 713, 714 (J.P.M.L. 1985) (denying transfer: "Although we recognize that the actions in this litigation involve some common questions of fact, we are not persuaded that these common questions of fact will predominate over individual questions of fact present in each action."); *In re Deering Milliken Patent Litigation*, 476 F. Supp. 461, 464 (J.P.M.L. 1979) ("Most, if not all, of the common questions of fact between the two actions before us arise from the liability issues in each action. All pretrial proceedings, as well as a trial, on the liability issues in the South Carolina action have long since been completed. . .. Also, interjection of the North Carolina

action into the extremely advanced proceedings in the South Carolina action could delay the completion of those proceedings."); *In re United Gas Pipe Line Co. Litig.*, 391 F. Supp. 774, 776 (J.P.M.L. 1975) (denying transfer where factual issues predominantly unique to each plaintiff's relationship with defendant); *In re Grand Funk Railroad Trademark Litig.*, 371 F. Supp. 1084, 1085 (J.P.M.L. 1974) (denying transfer where "the discovery involving defendants' alleged infringement will focus on localized factual issues"); *In re Air Crash Disaster Near Silver Plume*, 368 F. Supp. 810, 811 (J.P.M.L. 1973) (denying transfer where there were only limited questions of fact in common).

Even a finding that discovery has substantially progressed or that a case is nearing trial is ordinarily sufficient to prevent transfer. "[A] finding that discovery already has progressed quite far in one or more of the actions . . . or that some of the cases proposed for consolidation are proceeding expeditiously and are near trial, . . . or that an important motion is under submission in one of the original courts typically will result in a denial of transfer, at least of those actions that are maturing in their home districts and probably would not benefit from the transfer." 15 WRIGHT, MILLER AND COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3863 (2d ed. 1986 and 1998 Supp.). *See also* 17 MOORE'S FEDERAL PRACTICE § 112.05 (3d ed. 1997) ("when the pretrial proceedings in a case or group of cases are very nearly complete or discovery is well advanced, the Panel will decline to order transfer of that case or group of cases. . . . The denial of a transfer because the pretrial activities in a case have been completed or are nearly completed also applies to tag-along actions that would otherwise be transferred and coordinated with related actions that have previously been transferred."); American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* § 3.01 (1994) (stating that one of the principal concerns in deciding whether or not to transfer a case is "the stages to which the actions already have progressed").

The Third Circuit's judgment conflicts with many other

decisions in the lower courts:

· *In re Dow Chem. Co. "Sarabond" Prods. Liability Litigation*, 650 F. Supp. 187 (J.P.M.L. 1986) (action pending for over three years was at a sufficiently advanced stage to warrant its exclusion from a Section 1407 transfer).

· *In re Asbestos School Prods. Liab. Litig.*, 606 F. Supp. 713, 714 (J.P.M.L. 1985) (denying transfer and "not[ing] that the common questions of fact involved in these actions have been extensively litigated for the past ten years in connection with thousands of personal injury actions arising from alleged asbestos exposure").

· *In re A.H. Robins Co., Inc. "Dalkon Shield" IUD Prod. Liab. Litig.*, 570 F. Supp. 1480, 1481-1482 (J.P.M.L. 1983) (since reopened common discovery proceedings in actions that had previously been transferred were almost complete, transfer of additional cases would not serve convenience of parties or just and efficient conduct of litigation).

· *In re Rely Tampon Prod. Liab. Litig.*, 533 F. Supp. 1346, 1347 (J.P.M.L. 1982) (denying transfer where "1) discovery in many actions in this docket is well advanced; and 2) pretrial proceedings have been completed and trial is imminent in at least two actions. Under these circumstances, we cannot conclude that centralization of the actions in this litigation under Section 1407 will further the purposes of the statute.").

· *In re A. H. Robins Co., "Dalkon Shield" IUD Prods. Liab. Litig.*, 505 F. Supp. 221, 223 (J.P.M.L. 1981) ("Although we recognize that these actions share questions of fact with actions previously transferred in this litigation, we are not persuaded that transfer under Section 1407 remains appropriate for newly filed actions in this docket. This litigation has been pending for over five years and discovery of common issues has been completed in the transferee district.").

· *In re Ecuadorian Oil Concession Litigation*, 487 F. Supp. 1364, 1368 (J.P.M.L. 1980) (denying transfer where "[t]he

Delaware action and the Florida action have each been pending for almost three and one half years. All parties represent that extensive document discovery is virtually complete in both actions; and a June 30, 1980 discovery cutoff has been established in the Delaware action. Under these circumstances, centralization of the Florida and Delaware actions could delay the termination of the Delaware action without producing any overriding benefits.").

· *In re Insulin Mfg. Antitrust Litigation*, 487 F. Supp. 1359, 1361 (J.P.M.L. 1980) (denying transfer where "[t]he Illinois action was commenced over two years ago, considerable discovery has occurred in this action, and the Illinois plaintiff maintains that the action is nearly ready for trial. Thus, on the basis of the record before us, inclusion of the Illinois action in centralized pretrial proceedings could delay the termination of that action without producing any overriding benefit to the litigation as a whole.").

· *In re Cable Tie Patent Litigation*, 487 F. Supp. 1351, 1354 (J.P.M.L. 1980) (denying transfer where "[t]he two Illinois actions against All States have been pending for over three years, and discovery concerning the common factual questions in this litigation is well advanced").

· *In re Chiropractic Antitrust Litigation*, 483 F. Supp. 811, 813 (J.P.M.L. 1980) (denying transfer where "discovery in the Illinois action is near completion, and inclusion of this action in centralized pretrial proceedings could delay the termination of that action without producing any overriding benefit to the litigation as a whole").

· *In re Midwest Milk Monopolization Litigation*, 483 F. Supp. 823 (J.P.M.L. 1980) (tag-along transfer was refused when the lead transferred case had been in trial for over two years and when the potential tag-a-long case had been pending for over four-and-one-half years).

· *In re Motion Picture Licensing Antitrust Litig.*, 479 F. Supp.

581, 590 (J.P.M.L. 1979) (transfer of actions for consolidation with previously transferred actions was not ordered, since discovery in other pretrial proceedings was well advanced).

· *In re McDonald's Franchise Antitrust Litigation*, 472 F. Supp. 111, 114 (J.P.M.L. 1979) (denying transfer: "All discovery has been concluded in the Virginia action, and trial is imminent in that action. The Florida action has been pending for several years and, on the basis of the record before us, discovery on the real estate tying claim in that action is nearly, or perhaps entirely, completed. Therefore, nothing would be achieved by including those two actions in coordinated or consolidated pretrial proceedings.").

· *In re Women's Clothing Antitrust Litigation*, 455 F. Supp. 1388, 1390 (J.P.M.L. 1978) ("While we agree that these actions involve significant common questions of fact[,] . . . on balance we are persuaded that this factor is outweighed by the advanced stage of pretrial proceedings in these actions . . . .").

· *In re Ortho Pharmaceutical "Lippes Loop" Prods. Liability Litigation*, 447 F. Supp. 1073 (J.P.M.L. 1978) (when trial was "imminent" in one action and discovery cut-off and trial dates had been set in another, both actions were excluded from transfer).

· *In re Raymond Lee Organization, Inc., Secs. Litigation*, 446 F. Supp. 1266 (J.P.M.L. 1978) (discovery completed in one of two actions, thus diminishing benefits to be gained from transfer).

· *In re Allen Compound Bow Patent Litigation*, 446 F. Supp. 248, 250 (J.P.M.L. 1978) (denying transfer: "The California action has been pending for approximately two years, is well advanced, as movants acknowledge, on discovery concerning the common factual questions in this litigation, is set for a final pretrial conference on April 7, 1978, and is thus nearly ready for trial.").

· *In re Helicopter Crash Near Cameron, Louisiana, on April 23, 1976*, 443 F. Supp. 1022, 1023 (J.P.M.L. 1978) (denying transfer where trial court had set a final pretrial conference and

trial date).

· *In re Midwest Milk Monopolization Litigation*, 441 F. Supp. 930 (J.P.M.L. 1977) (denial of transfer of tagalong case that had proceeded in original district for more than three and one-half years and in which trial was imminent).

· *In re Southern Ry. Employment Practices Litigation*, 441 F. Supp. 926, 927 (J.P.M.L. 1977) (denying transfer where "[t]he Ohio action has been pending for over three years and considerable pretrial proceedings have occurred in that action.").

· *In re Westinghouse Elec. Corp. Employment Discrimination Litigation*, 438 F. Supp. 937, 939 (J.P.M.L. 1977) (denying transfer where "discovery and other pretrial proceedings in EEOC are nearly complete, that . . . action is near trial, and . . . therefore the action should not be included in coordinated or consolidated pretrial proceedings").

· *In re Luminex Int'l Prods. Liab. Litig.*, 434 F. Supp. 668, 669-670 (J.P.M.L. 1977) (transfer denied on ground that, though actions might share some common questions of fact, transfer to California would not necessarily serve convenience of parties and witnesses, or promote just and efficient conduct of actions, because pretrial proceedings in Louisiana action were well advanced).

· *In re Asbestos & Asbestos Insulation Material Prods. Liability Litigation*, 431 F. Supp. 906, 910 (J.P.M.L. 1977) (denying transfer where "many of these actions already are well advanced. Some of the actions have been pending for up to four years, and trial dates or discovery cutoff dates have been set in several actions. Under these circumstances, transfer would not further the purposes of Section 1407.").

· *In re Four Seasons Sec. Laws Litig.*, 362 F. Supp. 574, 575 (J.P.M.L. 1973) (denial of transfer because of completion or near-completion of pretrial activities applies to tag-along actions).

B. The Third Circuit Created a Direct Jurisdictional Conflict With the Eastern District of Texas

Prior to the transfer order, the Eastern District of Texas, proceeding on the assumption that "these cases [would] remain in this district for completion of the trials," App. 14a, had already outlined its plan for expeditiously resolving the remaining issues through mini-trials on exposure and damages, beginning in May 1999. The district court made arrangements for any additional discovery that was needed. "Discovery shall occur on a rolling basis and be focused on each group of plaintiffs as the dates for mini-trials approach." App. 14a. The district court also put in place procedures to encourage settlement, instructing that, "[a]t the conclusion of discovery for each mini-trial group of plaintiffs, those cases shall be referred to a qualified attorney mediator for mediation. Counsel are encouraged to agree upon the name of an attorney mediator. If counsel are unable to agree, the court will designate a mediator." App. 14a.

The transfer order in effect pulled the rug out from underneath the Eastern District of Texas. The transfer here will negate the Texas district court's efforts to resolve these cases promptly through mini-trials beginning in May 1999. The Third Circuit justified this internecine conflict by opining that "no judgments had been entered in the remaining 2,123 extrapolation cases." App. 6a n.2. But the Third Circuit's assertion was directly contrary to the Eastern District of Texas' holding that "the [Fifth Circuit] did approve of the phase I class-wide determination of issues of product defectiveness, warning, and a punitive damages multiplier," App. 12a, and that "the phase I class-wide findings were not disturbed by the Court of Appeals' decision." App. 13a. According to the Texas court, "[t]he phase I or liability part of the trial of all of these cases has been completed." App. 13a; according to the Third Circuit, the cases were in a "pretrial" posture. App. 3a.

In short, the Third Circuit was able to sustain its holding only by directly repudiating the prior decision of the Eastern District

of Texas. No constructive purpose will be served by transferring the cases to the Eastern District of Pennsylvania. The convenience of the parties will be not served: the evidence and witnesses relating to the remaining individualized exposure and damages issues are located in Texas, not in Pennsylvania.

Nor will justice or judicial economy be served. The transfer here was proposed by the defendant only as a delaying tactic, in response to the pressure brought by the Eastern District of Texas to resolve the cases in a quick and expeditious manner. The result of transfer will be to further prolong these cases, whose longevity is already an embarrassment to the judicial system. Approximately one-third of the plaintiffs have died since this case was tried in 1990. The transfer order will deny justice to even more of the sick and elderly plaintiffs who have already been made to suffer enough.

C. The Third Circuit Approved the Use of Impermissible Factors as Reasons for Transfer

The Judicial Panel on Multidistrict Litigation cited as factors relating to § 1407 transfer "the impact that scheduling of trials in the Texas forum would have on MDL-875 settlement efforts, MDL-875 settlement funding and the timing of remand actions for trial." App. 10a. These speculative concerns were wholly impermissible factors for the panel's consideration. The MDL statute contemplates that MDL proceedings will be used "for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). The MDL statute does not authorize the MDL panel or the MDL transferor court to interfere with cases where the common issues have already been resolved, in order to preserve the defendants' assets or to promote settlements in other cases. The MDL statute is not a limited-fund class action provision, or a substitute for bankruptcy, or a cramdown provision designed to preserve the defendants' assets. Section 1407 provides for the coordination of pretrial proceedings, not for the coordination of

settlement strategies.

This Court has already made clear that procedural rules are not to be bent simply to promote settlements — in asbestos or other cases. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (construing Fed. R. Civ. P. 23). As the Third Circuit itself opined, in a decision that was affirmed by this Court, "there is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 625 (3d Cir. 1996). The Panel on Multidistrict Litigation's consideration of the impact of transfer on the prospects for settlement in separate cases currently pending in Docket 875 was completely improper and by itself warrants review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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Appendix A

Unreported — Not Precedential

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1217

IN RE CLAUDE CIMINO, et al.

Petitioners,

On Petition from the United States District Court for the Eastern District of Pennsylvania and the Order of the Judicial Panel on Multidistrict Litigation (Asbestos Personal Injury MDL-875)

Argued June 22, 1999
Before: NYGAARD, WEIS, and STAPLETON, *Circuit Judges*
Filed July 26, 1999

OPINION OF THE COURT

WEIS, *Circuit Judge.*

Petitioners are a group of asbestos plaintiffs whose "tag-along" cases originally filed in the United States District Court for the Eastern District of Texas have been transferred to the Eastern District of Pennsylvania by the Judicial Panel on Multidistrict Litigation. Requesting that their cases be returned to the Texas court, petitioners request a writ of mandamus. We will deny the petition.

I.

In 1991, the Judicial Panel on Multidistrict Litigation ("Multidistrict Panel") ordered the bulk of federal asbestos cases transferred to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1407. *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). Because they were in a post-trial phase at that time, the *Cimino* cases were not involved in the initial transfer.

Some 3000 of the *Cimino* cases had been consolidated and a class certified by the trial court. The case had been submitted to multiple juries in 1990 under a three-phase plan. In Phase I, there was a complete trial for ten class representatives, and findings were made with respect to product defectiveness, warning, and punitive damages, including a multiplier as to each defendant. Phase II — which was supplanted by a stipulation — would have addressed exposure on a craft and job-site basis. In Phase III, 160 "sample" cases from five different disease categories were tried to determine individual damages.

After the juries announced their findings, the trial judge held that the damages in the various disease categories from Phase III were representative of the losses in the remaining 2,128 cases. He therefore calculated damages in five "extrapolation" cases based on the average damages in the corresponding disease categories. Punitive damages for each case would be based on the Phase I determination. Accordingly, judgment was entered against defendant Pittsburgh Corning in 157 cases (nine class representative cases; 143 sample cases; and five extrapolation cases).

The Court of Appeals for the Fifth Circuit, rejecting some aspects of the trial plan, reversed the judgments entered in the Phase III sample cases and the five extrapolation cases, and remanded for further proceedings. *Cimino v. Raymark Ind., Inc.*, 151 F.3d 297, 335 (5th Cir. 1998). The judgments in the nine class representatives' cases were remanded only for recalculation

of prejudgment interest. *Id.* According to the appellate Court, no judgments were entered in the remaining 2,123 extrapolation cases. *Id.* at 300 n.6.

Shortly afterwards, the Multidistrict Panel began transfer proceedings. The trial court, anticipating that transfer might not occur, entered an order providing for mini-trials of groups of eight plaintiffs on causation and damages in the 2,128 former extrapolation cases as well as trials on causation and possibly retrials on damages in the 143 sample cases. It therefore ordered the parties to arrange for additional discovery, including updated medical records, expert reports, and the circumstances of exposure. The court also read the Court of Appeals' opinion as approving application of the Phase I findings on product defectiveness, warning, and punitive damages to the entire class.

On Feb. 5, 1999, the Multidistrict Panel transferred these cases — 2,280 in total[1] — pursuant to MDL-875. It found that they involved common questions of fact with those previously transferred, and that the convenience of the parties and witnesses as well as the just and efficient conduct of the litigation would be served by the transfer. Commenting that these cases had been in a post-trial phase at the time of the initial MDL-875 transfer, the Multidistrict Panel held that they were now in a "pretrial status" by virtue of the Court of Appeals' rulings and could be transferred for the reasons stated in *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991).

The Multidistrict Panel also noted the success of the transferee judge in closing nearly 60,000 cases. It suggested that disputed issues — such as pretrial discovery, the need for other pretrial proceedings, settlement and funding issues — could be addressed by the transferee court, which would be in the best position to "conduct a substantive review of such elements and

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[1] This figure appears to correspond to the2,128 extrapolation cases, the 143 Phase III sample cases, and the nine class representatives.

their impact on the whole proceedings." The Multidistrict Panel pointed out that remand of claims or actions was available when deemed appropriate by the transferee judge. This petition followed.

II.

We have the authority to consider and grant a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651(a), and 28 U.S.C. § 1407(e), which states that the only review of an order of transfer is by extraordinary writ filed with the Court of Appeals having jurisdiction over the transferee court.

Petitioners seek a writ of mandamus to (1) order the Multidistrict Panel to vacate its order of transfer; and (2) order the Eastern District of Pennsylvania to transfer the cases back to the Eastern District of Texas. As a preliminary matter, we note that recent case law makes it clear that only the Multidistrict Panel, and not the transferee court, has the power to transfer cases back to the original trial court. *In re Roberts*, __ F.3d __, No. 98-1593, 1999 WL 330198, at *1 (3d Cir. May 20, 1999); *see also Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40-41 & n.4 (1998). Accordingly, we will construe the petition as a request to order the Multidistrict Panel to remand the *Cimino* cases to the trial court.

A writ of mandamus is an "extraordinary" remedy that is traditionally used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Mallard v. United States District Court*, 490 U.S. 296, 308 (1989) (internal quotation marks omitted); *see also* Fed. R. App. P. 21. A litigant seeking a writ of mandamus must show exceptional circumstances that amount to a usurpation of judicial power, or a clear abuse of discretion. *Mallard*, 490 U.S. at 309.

The petitioner must have "no other adequate means to attain" the desired relief, and has the burden of showing a "clear and indisputable" right to the writ. *Kerr v. United States District*

Court, 426 U.S. 394, 403 (1976) (internal quotation marks omitted). Even where both prerequisites are met, however, issuance of the writ remains largely discretionary. *Id.*

Here, petitioners can show neither an abuse of discretion in the order of transfer, nor a clear and indisputable right of remand. Civil actions involving "one or more common questions of fact" that are pending before multiple districts may be transferred to any district "for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). Transfer must be "for the convenience of parties and witnesses and [] promote the just and efficient conduct of such actions." *Id.* The purpose of the statute is to conserve judicial resources by avoiding the waste of duplicative pre-trial proceedings. 17 James W. Moore, et al., MOORE'S FEDERAL PRACTICE § 112.04[1][b], at 112-38 (3d ed. 1999).

The Multidistrict Panel interprets the "common questions of fact" requirement broadly, and will even transfer cases that involve common important or dispositive questions of law, in addition to the existence of some common questions of fact. *See In re Mutual Fund Sales Antitrust Litig.*, 361 F. Supp. 638, 640 (J.P.M.L. 1973). The "convenience of parties and witnesses" requirement is viewed from the group perspective. *In re Multidistrict Civil Antitrust Actions Involving Antibiotic Drugs*, 299 F. Supp. 1403, 1405 (J.P.M.L. 1969).

The most important requirement is that transfer promote the just and efficient conduct of the actions. 17 Moore, *supra*, § 112.04[1][d], at 112-44; *see also In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990). Thus, there need not be a predominance of common questions of fact if the Multidistrict Panel believes that transfer is otherwise appropriate to achieve the just and efficient conduct of the actions. *Antibiotic Drugs*, 299 F. Supp. at 1406.

There remain many common questions of fact in the *Cimino* cases.[2] For the 143 sample cases, issues of causation clearly remain, and for the 2,128 extrapolation plaintiffs, additional questions with respect to damages have not been resolved.[3] Even if one assumes that some "common" issues are now settled, there are others still open. Subsection 1407(a) "does not require that there be strict identity of issues or a predominance of common questions or that they be central to or determinative of the controversy in order to justify transfer." 15 Charles Alan Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 3863, at 523 (1986). Thus, there are factual commonalities among these cases, which are similar to those asbestos cases already transferred.

Aside from the factual issues, there remain many common important matters of law, further justifying transfer. *See Mutual Fund Sales Antitrust Litig.*, 361 F. Supp. at 640; 17 Moore, *supra*, § 112.04[1][b], at 112-40.

Counsel cites the second statutory requirement — convenience of the parties and witnesses — and argues that most of them are in Texas and therefore, that transfer is not to their

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[2] The parties vigorously dispute whether the trial court's determinations on liability, warning, and punitive damages are binding on the entire class as the "law of the case." Despite petitioners' assertions to the contrary, the *Cimino* appellate court stated that no judgments had been entered in the remaining 2,123 extrapolation cases. *Cimino*, 151 F.3d at 300 n.6. Because we conclude that transfer was otherwise appropriate, we need not resolve this dispute. However, we would note that the use of the class action device to settle asbestos cases has been questioned in several recent Supreme Court opinions. *See Ortiz v. Fibreboard Corp.*, ___ U.S. ___, No. 97-1704, 1999 WL 412604 (June 23, 1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997).

[3] We are uncertain as to the status of the nine class representatives because the papers filed in this Court do not detail their exact situation. It may be that the only matter remaining as to these plaintiffs is recalculation of prejudgment interest. If so, they retain the ability to seek remand. *See* Rules of J.P.M.L. 7.6. That these petitioners may do so further requires that we deny the extraordinary writ. *See Kerr*, 426 U.S. at 403 (the petitioner should have "no other adequate means to attain" the desired relief).

benefit. However, the Multidistrict Panel looks to the group as a whole, and not to individuals. *Antibiotic Drugs*, 299 F. Supp. at 1405. Similar objections were addressed during the initial transfers under MDL-875. *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. at 421-23 (cataloguing devices that the transferee court could use to protect individual interests). Now, as then, the broader group will benefit from consolidated treatment.

Finally, the most important element — judicial efficiency — will be amply served by the transfer. In this case, the trial judge said: "If the Court could somehow close thirty cases a month, it would take six and one-half years to try these cases and there would be pending over 5,000 untouched cases at the present rate of filing." *Cimino v. Raymark Ind., Inc.*, 751 F. Supp. 649, 652 (E.D. Tex. 1990), *rev'd in part*, 151 F.3d 297 (5th Cir. 1998).

In contrast, Judge Weiner (the transferee judge in the Eastern District of Pennsylvania) has had great success in handling the tsunami of asbestos cases sent his way. Almost 27,000 cases were initially consolidated in 1991. Since then, including the addition of tag-along cases, he has disposed of nearly 60,000. Also, nearly 1,000 actions or claims have been returned to their original transferor districts. Judge Weiner has proven himself an able manager of litigation that the judiciary at every level has described as vexing. *See Ortiz*, 1999 WL 412604, at *5 (referring to the "elephantine mass of asbestos cases"). The "just and efficient conduct" of these actions will therefore be well served by the transfer to his watch.

III.

Because this litigation is once again in a pretrial status, the Multidistrict Panel acted properly in transferring these actions. In doing so, it neither usurped the judicial authority, nor committed a clear abuse of discretion.[4]

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[4] To the extent that any particular case might merit remand, the proper course for such a litigant is to ask for a suggestion of remand from Judge Weiner, or to seek remand directly from the Multidistrict Panel. *See* 28 U.S.C. § 1407(a);

Accordingly, the petition for a writ of mandamus will be denied.

TO THE CLERK:

Please file the foregoing Opinion.

/s/
United States Circuit Judge

July 26, 1999

Rules of J.P.M.L. 7.6. That petitioners have failed to do so further cuts against their request for the extraordinary writ. *See Kerr*, 426 U.S. at 403 (the petitioner should have "no other adequate means to attain" the desired relief).

Appendix B

Docket No. 875

Before the Judicial Panel on Multidistrict Litigation

In re Asbestos Products Liability Litigation (No. VI)

Before John F. Nangle, Chairman, William B. Enright, Charles A. Brimmer, John F. Grady, Barefoot Sanders,* Louis C. Bechtle and John F. Keenan, Judges of the Panel.

Transfer Order

Before the Panel are motions brought, pursuant to Rule 7.4, R.P.J.P.M.L., 181 F.R.D. 1, 10 (1998), by plaintiffs in the 2,280 Eastern District of Texas actions listed on the attached Schedule A. Movants request that the panel vacate the portions of its orders conditionally transferring their respective action to the Eastern District of Pennsylvania for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket before Judge Charles R. Weiner. Common defendant Pittsburgh Corning Corp. supports transfer.

On the basis of the papers filed and the hearing held, the Panel finds that these actions involve common questions of fact with actions in this litigation previously transferred to the Eastern District of Pennsylvania, and that transfer of the actions to the Eastern District of Pennsylvania for inclusion in the coordinated or consolidated pretrial proceedings in that district will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. We find that transfer of these actions is appropriate for reasons expressed by the Panel in its

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* Judge Sanders took no part in the decision of this matter.

original decision in this docket directing centralization of all pending federal court actions not then in trial involving allegations of personal injury or wrongful death caused by asbestos or asbestos-containing products. *See In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). These Texas actions, which were in a post-trial appellate phase at the time of the Panel's initial MDL-875 order, are again in a pretrial status as a result of a recent appellate decision and thus fall within the parameters for transfer established by the Panel in this docket. We note that in the Panel's original decision distinctions based on such matters as the docket condition of any specific federal district and the stage of pretrial pretrial proceedings were considered and rejected by the Panel as grounds for carving out exceptions to transfer in this extraordinary docket.

We are not persuaded to depart from this approach in dealing with the question of transfer of these actions now before the Panel. We note that under Judge Weiner's stewardship, as of February 3, 1999, i) nearly 60,000 actions have been closed in the transferee district, and ii) nearly 1,000 actions or claims therein have been returned to their originating transferor districts. Because many of the factors relating to the question of 1407 transfer of these actions (e.g., the status of pretrial discovery, the need for other pretrial proceedings apart from discovery, and the impact that scheduling of trials in the Texas forum would have on MDL-875 settlement efforts, MDL-875 settlement funding and the timing of remand of actions for trial) are either disputed by the parties or affect the overall management of the litigation, we prefer to give the transferee court the opportunity to conduct a substantive review of such elements and their impact on the whole proceedings. To parties that believe their situation renders inclusion of their action in MDL-875 unnecessary or inadvisable, we note that whenever the transferee judge deems remand of any claims or actions appropriate, procedures are available whereby this may be accomplished with a minimum of delay. *See* Rule

7.6, R.P.J.P.M.L., *supra*, 181 F.R.D. at 11-13. We are confident that Judge Weiner will continue to promptly review arguments for returning transferred actions or claims to their transferor courts and will take all appropriate steps to assure their speedy return whenever he is convinced that retention in the MDL-875 proceedings is no longer needed.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, the actions listed on the attached Schedule A be, and the same hereby are, transferred to the Eastern District of Pennsylvania and, with the consent of that court, assigned to the Honorable Charles R. Weiner for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket.

For the Panel:

/s/
John P. Nangle
Chairman

Feb. 5, 1999

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CLAUDE CIMINO, ET AL.	)	
	)	
V.	)	Case No. 1: 86 CV 456
	)	
RAYMARK INDUSTRIES, INC., ET AL.	)	

INITIAL CASE MANAGEMENT ORDER

On August 17, 1998, the United States Court of Appeals for the Fifth Circuit reversed and remanded to this court the judgments entered in 143 phase III sample cases and five of the "extrapolation cases." *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998). The judgments in the nine class representatives' cases were remanded for recalculation of prejudgment interest. As a result of the decision of the Court of Appeals in rejecting some aspects of this court's trial plan in *Cimino*, there remain pending for disposition the 143 phase III sample cases and around 2,128 so-called "extrapolation cases."

Although the Court of Appeals disapproved of the extrapolation procedure which was used by this court, the opinion by the Appeals Court did approve of the phase I class-wide determination of issues of product defectiveness, warning, and a punitive damages multiplier. Referring to its earlier opinion in *In re Fibreboard*, 893 F.2d 706 (5th Cir. 1990), the Court of Appeals stated that "[i]n Fibreboard, we found no impediment to the trial of Phase I." *Cimino*, 151 F.3d at 317. Likewise, in footnote 8 of its opinion, the Court of Appeals reiterated its decision in *Jenkins v. Raymark Industries*, 782 F.2d 468 (5th Cir. 1986) wherein it approved a similar asbestos class action

providing for "class-wide trial of essentially the same phase I common issues, but to be followed by consolidated mini-trials of four to ten plaintiffs on the issues of exposure . . . damages . . . and any comparative fault of each plaintiff . . . ." *Cimino*, 151 F.3d at 301 fn 8. Also, Pittsburgh Corning's appeal of the punitive damages multiplier as established by the phase I jury was rejected by the Court of Appeals. *Cimino*, 151 F.3d at 323-324.

With respect to the phase III sample cases, the Court of Appeals held that ". . . the trial plan was adequately individualized and preserved Seventh Amendment rights with respect to each individual's actual damages from an asbestos-related disease." *Cimino*, 151 F.3d at 314-15. What was lacking in phase III, according to the Appeals Court, was a determination of whether exposure to a Pittsburgh Corning product caused the disease.

In their most recent post-appeal written submission to this court on a proposed trial plan, the plaintiffs contend that the language quoted above as well as other language in the Appeal Court's opinion indicates that the 143 phase III damages verdicts stand intact. However, as pointed out by Pittsburgh Corning in its November 24 response, the plaintiffs asserted in their initial memorandum and proposed trial management plan that the phase III damages determination "fell along with the trial plan." Therefore, the question of whether the damages verdicts in those phase III cases were preserved following the appeal will have to be resolved. The position taken by the plaintiffs on this issue is somewhat unclear to the court at this point.

Nevertheless, because the phase I class-wide findings were not disturbed by the Court of Appeals' decision, what remains for this court are shortened mini-trials on causation and damages in 2,218 cases and on causation and perhaps damages in 143 cases. The phase I or liability part of the trial of all of these cases has been completed.

Pittsburgh Corning has suggested to the Judicial Panel on Multidistrict Litigation that these cases should be consolidated

with MDL 875 as tag-along cases. The Panel will now have to make a decision on whether it is appropriate to transfer these cases, in which issues of product defect, warning and punitive damages have already been tried, to the transferee court in MDL 875. However, assuming these cases remain in this district for completion of the trials, this court is prepared to begin the process the trying these cases in groups using the procedures approved in *Jenkins v. Raymark Industries, supra,* as soon as possible.

In order to facilitate the development of a trial management plan, counsel for all parties are hereby ORDERED to meet in person and confer in a good faith effort to agree on a trial plan which shall be incorporated into a more detailed case management order. The trial plan should include any additional discovery that may be warranted, such as updated medical records and expert reports and discovery into the circumstances of exposure. Discovery shall occur on a rolling basis and be focused on each group of plaintiffs as the dates for mini-trials approach.

At the conclusion of discovery for each mini-trial group of plaintiffs, those cases shall be referred to a qualified attorney mediator for mediation. Counsel are encouraged to agree upon the name of an attorney mediator. If counsel are unable to agree, the court will designate a mediator.

For those cases that do not settle through mediation, the court desires to conduct mini-trials in groups of eight plaintiffs. That number may be increased to ten after the completion of a few trials. Counsel shall discuss and endeavor to reach agreement on a fair method for selecting plaintiffs for group trials. Both sides have suggested in their written submissions, and the court agrees, that the plaintiffs who are grouped together in each mini-trial should insofar as possible come from the same work sites and similar crafts in order to expedite the presentation of evidence on exposure.

Counsel shall structure the proposed trial plan in a manner that will schedule the first mini-trial in May of 1999. The second mini-trial shall occur in June of 1999. Thereafter, the court will conduct two mini-trials per month in separate courtrooms, provided that the two district judges involved are able to attend to the other demands of their dockets. Both sides are encouraged to consent to trials by magistrate judges. In addition, the court foresees extensive participation of magistrate judges in pretrial hearings on issues such as evidentiary matters.

Although it is premature to make a final decision at this time on trial time limits, in light of the large number of cases and the need to efficiently process mini-trials, the court anticipates imposing reasonable time limits on both sides. Each side will be given an equal amount of time which will be determined after the submission of witness lists and estimates on the expected duration of direct and cross exam and the necessity for each listed witness.

Counsel for all parties shall meet and confer at a mutually acceptable time and place, but not later than December 31, 1998. A proposed case management order containing the agreed trial plan shall be submitted to the court on or before January 15, 1999. Counsel shall designate those matters on which they are unable to reach agreement.

SO ORDERED.

Signed this the 2nd day of December, 1998.

/s/
Richard A. Schell,
United States District Judge

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1217

IN RE CLAUDE CIMINO, et al.

Petitioners,

On Petition from the United States District Court for the Eastern District of Pennsylvania and the Order of the Judicial Panel on Multidistrict Litigation (Asbestos Personal Injury MDL-875)

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge.*
SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, AND WEIS.[1]

The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court in banc, the petition for rehearing is hereby DENIED.

Chief Judge Becker would have granted rehearing.[2]

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[1] Vote limited to panel rehearing only.

[2] Chief Judge Becker would have granted rehearing en banc. He believes that

By the Court,

/s/
United States Circuit Judge

DATED: Sept. 9, 1999

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the Judicial Panel on Multidistrict Litigation abused its discretion in determining that there were common questions of fact whose resolution would be served by the transfer of the *Cimino* cases to the transferee court. He sees the only causation questions remaining as those relating to individual damages determinations.

(2)

Supreme Court, U.S.
FILED
JAN 5 2000
CLERK

No. 99-948

IN THE

Supreme Court of the United States

CLAUDE CIMINO, *et al.*,

Petitioners,

v.

PITTSBURGH CORNING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit Was Correct in Holding that the Judicial Panel on Multidistrict Litigation Did Not Abuse Its Discretion in Transferring Certain Asbestos Cases under 28 U.S.C. § 1407.

PARTIES TO THE PROCEEDING

The petitioners are approximately two thousand personal injury asbestos plaintiffs in the Eastern District of Texas. The case takes its name from one of those plaintiffs — Claude Cimino.

The respondent is Pittsburgh Corning Corporation — a defendant in the court below.

Pittsburgh Corning Corporation is owned by PPG Industries, Inc. and Corning Glass Works each of which holds a 50% shareholder interest.

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Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 26

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 74 S. Ct. 145, 98 L. Ed. 106 (1953) 9

Cimino v. Raymark Industries, Inc., 151 F.3d 297 (5th Cir. 1998) ..... *passim*

Georgine v. Amchem Products, Inc. 83 F.3d 610 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997) 18, 19, 25, 26

Hahnemann University Hospital v. Edgar, 74 F.3d 456 (3d Cir. 1996) 9

In re A.H. Robins Co., "Dalkon Shield" IUD Prods. Liability Litigation, 505 F. Supp. 221 (J.P.M.L. 1981) 21

In re A.H. Robins Co., "Dalkon Shield" IUD Prods. Liability Litigation, 570 F. Supp. 1480 (J.P.M.L. 1983) 21

In re Air Crash Disaster Near Silver Plume, 368 F. Supp. 810 (J.P.M.L. 1973) 19

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In re Allen Compound Bow Patent Litigation, 446 F. Supp. 248 (J.P.M.L. 1978) 20

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In re Cable Tie Patent Litigation, 487 F. Supp. 1351 (J.P.M.L. 1980) 20

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In re Chiropractic Antitrust Litigation, 483 F. Supp. 811 (J.P.M.L. 1980) 20

In re Deering Millikan Patent Litigation, 476 F. Supp. 461 (J.P.M.L. 1979) 19

In re Dow Chem. Co. "Sarabond" Prods. Liability Litigation. 650 F. Supp. 187 (J.P.M.L. 1986) ... 20

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In re Grand Funk Railroad Trademark Litig., 371 F. Supp. 1084 (J.P.M.L. 1974) 19

In re Helicopter Crash Near Cameron, Louisiana, on April 23, 1976, 443 F. Supp. 1022 (J.P.M.L. 1978) 20

In re Insulin Mfg. Antitrust Litigation, 487 F. Supp. 1359 (J.P.M.L. 1980) 20

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In re McDonald's Franchise Antitrust Litigation, 472 F. Supp. 111 (J.P.M.L. 1979) 20

In re Motion Picture Licensing Antitrust Litig., 479 F. Supp. 581 (J.P.M.L. 1979) 21

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In re Multi-Piece Rim Products Liability Litig., 653 F.2d 671 (D.C. Cir. 1981)	15
In re Ortho Pharmaceutical "Lippes Loop" Prods. Liability Litigation, 447 F. Supp. 1073 (J.P.M.L. 1978)	20
In re Raymond Lee Organization, Inc. Secs. Litigation, 446 F. Supp. 1266 (J.P.M.L. 1978)	20
In re Regents University of California, 964 F.2d 1128 (Fed. Cir. 1992)	9
In re Rely Tampon Prod. Liab. Litig., 533 F. Supp. 1346 (J.P.M.L. 1982)	20
In re Southern Ry. Employment Practices Litigation, 441 F. Supp. 926 (J.P.M.L. 1977)	20
In re Sugar Industry Antitrust Litigation (East Coast), 471 F. Supp. 1089 (J.P.M.L., 1979)	23
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Matter of New York City Municipal Securities Litigation, 572 F.2d 49 (2nd Cir. 1978)	9
Midwest Milk Monopolization Litigation, 441 F. Supp. 930 (J.P.M.L. 1977)	21
Midwest Milk Monopolization Litigation, 483 F. Supp. 823 (J.P.M.L. 1980)	21
Ortiz v. Fibreboard, 119 S. Ct. 2295 (1999)	19
Transportation Insurance Company v. Moriel, 879 S.W.2d 10 (Tex. 1994)	5
Wilson v. Johns Manville Corp., 107 F.R.D. 250 (S.D. Tex. 1985), *aff'd on other grounds*, 810 F.2d 1358 (5th Cir), *cert. denied*, 484 U.S. 828, 108 S. Ct. 97 (1987)	21
Wilson v. Johns Manville Corp., 873 F.2d 869 (5th Cir. 1989)	21

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Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575 15

Wright, Miller, and Cooper, *Federal Practice and Procedure*, 1999 Supp., p. 876, § 4478 15

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15(2), the respondent hereby submits its own statement of the case because petitioners' statement of the case is incomplete and argumentative.

Cimino began when the United States District Court for the Eastern District of Texas issued orders on October 26, 1989 consolidating 3,031 personal injury asbestos cases for a three phase trial proceeding to commence on February 6, 1990. Phase I was to have been a common issues trial of liability and punitive damages. Phase II was to have been a trial of certain representative cases with the assessment of an omnibus award for all 3,031 cases. Phase III was to have been a non-jury proceeding (without involvement of defendants) in which the award would be distributed among the 3,031 plaintiffs. Only three months were allowed for discovery. Depositions were limited to 45 minutes per plaintiff and the defendants were required to bring medical personnel and equipment to Beaumont Texas to examine approximately 100 plaintiffs per day. Virtually all of these procedures were imposed on the defendants over their objection. The trial plan was challenged by a mandamus petition and invalidated by the Fifth Circuit in *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) on the grounds that it exceeded the scope of judicial authority.

On remand, the plan was modified. At first, Phase I was to comprise a complete jury trial of ten plaintiffs and an attempt to determine certain "common" issues. Mid-way through these proceedings, however, the court (by order dated March 5, 1990), once again modified the plan. The new plan called for a Phase I full trial of ten plaintiffs followed by

Phase III "trials" of damages (but not exposure) to two separate juries as to 160 sample plaintiffs. Phase II (which was to follow Phase III) was to have been a trial on exposure not of individuals but by classes of plaintiffs at various times by craft, worksite (22 different sites) and time (in 10 year increments over 40 year period). Phase II was ultimately replaced by a limited stipulation, the express purpose of which was to facilitate appellate review[1]. The District Court thereafter extrapolated the results of the 160 sample cases to the remaining group of what had then become 2,128. Judgments were entered in nine cases which were fully tried, 143 sample cases, and five extrapolated cases.

The process of entering and reviewing these judgments was taking place in the District Court when the Judicial Panel on Multidistrict Litigation entered its order centralizing virtually all asbestos cases in 1991. *See In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991).

Appeals were eventually taken from the final judgments. Because of the number and complexity of the appellate issues, the Chief Judge of the Fifth Circuit issued an order on December 15, 1993 providing for multiple appellate phases, if necessary. Pursuant to this procedure, respondent (appellant below) reserved certain issues to the second phase

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1. Without this stipulation, an appeal may have become impossible because of onerous bonding requirements. The amount in the 157 cases in which judgment was actually entered was approximately $69,000,000. The remaining extrapolation cases called for judgments in the approximate total amount of $1,300,000,000 for actual damages alone excluding prejudgment interest and punitive damages. *See Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 300 (5th Cir. 1998).

if necessary. One of these issues was the appropriateness of class action certification.

The second phase of the appeal became unnecessary. Relying in part on its reasoning in *Fibreboard*, the Fifth Circuit in *Cimino v. Raymark Industries Inc.*, 151 F.3d 297 (5th Cir. 1998) invalidated all but Phase I of the trial and reversed the judgments in all the Phase III and extrapolation cases. A principal basis of the Fifth Circuit's decision was that the trial plan deprived the defendant of a right to a jury trial by dispensing with the requirement of proof of causation. The Fifth Circuit also commented as follows with respect to certain contested Phase III and extrapolation case issues:

> we *pretermit* any consideration of any remaining claims of Pittsburgh Corning, and of any claims of error raised by plaintiffs in their cross-appeal as to Pittsburgh Corning, which relate solely to some or all of the phase III cases or some or all of the extrapolation cases or solely to both. Any other claims of Pittsburgh Corning, and plaintiffs on their referenced cross-appeal, we consider *solely* insofar as they pertain to the nine judgments in the phase I class representative cases.

Id. at 321. (emphasis added)

The suggestion to the Judicial Panel on Multidistrict Litigation that these remanded cases were appropriate "tag-along actions" followed shortly thereafter[2]. Conditional

2. Under Rule 1.1 of the Rules of Procedure of the Panel, a "tag-along action" is a civil action pending in a district court and involving common questions of fact with actions previously transferred.

Transfer Orders (CTO-139 and CTO-140) were filed by the Judicial Panel on November 25, 1998.

Prior to final action by the Judicial Panel, a complicated dispute ensued over the interpretation of the Fifth Circuit's 1998 opinion. The plaintiffs asserted that all but the exposure and extrapolation findings survived the original *Cimino* proceedings and that the liability findings from Phase I and the Phase III damages findings remained in effect. They also claimed that the 3 to 1 punitive damages multiplier extended automatically to every one of the over two thousand remaining cases. Plaintiffs sought confirmation of their views from the Fifth Circuit via a Petition for Panel Rehearing which was denied without opinion. The defendant, by contrast, asserted that the Fifth Circuit had been clear that it was not deciding any issues beyond those in the nine fully tried cases by virtue of the language wherein it stated that "we pretermit any consideration of any remaining claims of Pittsburgh Corning, . . ." *Id* [3].

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3. Although the Fifth Circuit rejected Pittsburgh Corning's challenge to the multiplier, its decision so doing was quite narrow. *Id.* at 323. This decision was expressly based on the multiplier as considered in the prior holdings of *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986) and *In re Fibreboard*, 893 F.2d 706 (5th Cir. 1990). There is a major difference between the *Jenkins* and *Cimino* Phase I informed multiplier and the blind multiplier of the *Cimino* Phase III and extrapolation cases. The proposed procedure in *Jenkins* (as endorsed in *Fibreboard*) provided that any punitive damages would be awarded only after all class members' actual damages claims had been determined and after a special master had surveyed the class and prepared a report detailing the class members and their claims in order to apprise the jury of the gravity and extent of the absent members' claims and the typicality of the representatives' claims. *See Jenkins v. Raymark Industries, Inc.*, 782 (Cont'd)

In an Initial Case Management Order dated December 2, 1998, the District Court in Texas agreed largely with the plaintiffs on the issues in this dispute by holding that liability and punitive damage multiplier findings from the original proceedings would apply to the entire remaining group of 143 sample and 2,128 "extrapolation" cases. This Case Management Order provided for certain discovery and for trials to be held on causation and damages in 2,128 cases and on causation and perhaps damages in 143 cases.

In the meantime, proceedings went forward before the Judicial Panel on Multidistrict Litigation. On December 21, 1998, the plaintiffs filed a brief supporting the vacating of the conditional transfer orders. On January 11, 1999, the defendant filed opposition papers. On January 29, 1999, the Panel heard oral argument. It issued a decision transferring the cases 7 days later on February 5, 1999. The Panel found that there were common questions of fact with the asbestos cases previously transferred and that transfer will serve the

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(Cont'd)

F.2d at 471. Therefore, in *Cimino* Phase I, the jury knew all about the nine plaintiffs as to whom its punitive damages multiplier was affirmed. By contrast, however, the Phase I jury in *Cimino* knew virtually nothing about the thousands of plaintiffs as to whom the Phase III and extrapolation multipliers would have been applied. There is a difference between these two types of multipliers. Texas law provides that a jury may not award punitive damages when it knows nothing about the situation and sensibilities of the parties and the relationship of the defendant's conduct to the likelihood of harm of the plaintiff. *See Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981); *Transportation Insurance Company v. Moriel*, 879 S.W.2d 10 (Tex. 1994). The endorsement of a blind multiplier would have presented a serious *Erie* problem and it is thus not surprising that the Fifth Circuit was content to "pretermit" the consideration of any such claim.

convenience of the parties and promote the just and efficient conduct of the litigation. It found that transfer was appropriate for reasons expressed by the Panel in its 1991 centralization order. *In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). It also found that the cases were "again in a pretrial status". The Panel indicated that it was not persuaded to depart from the centralization approach in dealing with these cases noting the success of the transferee Judge (Weiner, J.) of the Eastern District of Pennsylvania.

In response to the Panel's decision, the plaintiffs filed a petition for writ of mandamus in the United States Court of Appeals for the Third Circuit on or about March 15, 1999. The Court requested a brief from the respondent and held oral argument on June 22, 1999. On July 6, 1999, the petition was denied. The Court reiterated that the litigation was once again in a pretrial status. It held that the petitioners could show neither an abuse of discretion in the order of transfer nor a clear and indisputable right of remand. It further held that there remained many common issues of both fact and law, that transfer served the convenience of the parties and witnesses, and that judicial efficiency was amply served by the transfer. A petition for rehearing was denied.

This Petition followed[4].

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4. Copies of the opinions of the Third Circuit and the Judicial Panel on Multidistrict Litigation and the Case Management Order of the United States District Court for the Eastern District of Texas are appended to the Petition.

SUMMARY OF ARGUMENT

This Petition should be denied because the decision of the United States Court of Appeals for the Third Circuit does not conflict with that of any other circuit or involve an important question of federal law. The Third Circuit merely held that the Judicial Panel on Multidistrict Litigation did not abuse its discretion in transferring certain "tag along" asbestos cases to the Eastern District of Pennsylvania. Virtually all federal asbestos cases have been consolidated in multidistrict proceedings in the Eastern District of Pennsylvania for the last eight years. The transfer decision was a fact oriented one in an area where the scope of judicial discretion is particularly broad. The cases in question met all the criteria for transfer under 28 U.S.C. § 1407(a). The writ of certiorari does not exist for the purpose of second guessing the factual decisions of lower courts when determining whether or not there has been an abuse of discretion.

REASONS FOR DENYING THE WRIT

A writ of certiorari should be denied in this case for the following reasons.

I.

THIS CASE DOES NOT MEET THE CRITERIA FOR CERTIORARI

The criteria for the writ of certiorari are set out in Rule 10 of this Court. A petition for writ of certiorari is granted only for compelling reasons. In the case of the United States courts of appeals, a writ is generally granted only when the

court has entered a decision in conflict with that of another circuit on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power. A writ may also be granted when the court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. A petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The decision of the Third Circuit in this case does not meet any of these certiorari criteria.

There is no conflict among the circuits. The petitioners in this case are reduced to arguing that the decision conflicts with other decisions in what they refer to as the "lower" courts (Petition, pages 16-25). As will be seen more fully below, there is no such conflict at all. The majority of the so-called conflicting decisions are routine Judicial Panel on Multidistrict Litigation transfer denials. Such denials are a common and highly fact intensive phenomenon.

The Third Circuit's decision is not a departure from the usual course of proceedings or a decision on an important question of federal law that conflicts with the relevant decisions of this court or which should be settled by this court. The Third Circuit's decision was the denial of a mandamus petition. Mandamus is an extraordinary remedy

granted only in cases of abuse of judicial discretion[5]. Petitions for the writ of mandamus relating to Panel transfer orders are almost always denied for fact dependent reasons[6]. A decision not to transfer a case is not reviewable at all, 28 U.S.C. § 1407(e).

The Petition in this case fits squarely within the guidelines by which this Court does *not* grant petitions for certiorari. No rule of law was improperly stated. The "errors" asserted by the petitioners would relate primarily to the factual questions of whether there remain "common issues" to be tried, whether the cases are once "again in a pretrial status", and whether or not transfer serves the convenience of the parties and witnesses and is conducive to judicial efficiency. These are not the material of certiorari. The

5. *Mallard v. United States*, 490 U.S. 296, 309, 109 S. Ct. 1814, 1822, 104 L. Ed. 2d 318 (1989); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383, 74 S. Ct. 145, 148, 98 L. Ed. 106 (1953); *In re Chambers Development Co., Inc.*, 148 F.3d 214 (3d Cir. 1998); *Hahnemann University Hospital v. Edgar*, 74 F.3d 456 (3d Cir. 1996)

6. *See In Re Regents University of California*, 964 F.2d 1128 (Fed. Cir. 1992) (denying petition for writ of mandamus to vacate the Panel's order to consolidate five pending lawsuits involving recombinant DNA technology); *In re Ivy*, 901 F.2d 7 (2d Cir. 1990) (denying petition for writ of mandamus to vacate Panel's order transferring Agent Orange action); *Matter of New York City Municipal Securities Litigation*, 572 F.2d 49 (2nd Cir. 1978) (denying petition for writ of mandamus to review order of Panel transferring and consolidating cases involving federal securities laws). The only case identified in the proceedings below in which an extraordinary writ was issued to the MDL Panel was in a situation totally different from the case at bar. *See In re Food Lion, Inc. Fair Labor Standards Act Lit.*, 73 F.3d 528 (4th Cir. 1996) (Order issued to consolidate numerous remanded cases for a single appeal to avoid numerous appeals in various jurisdictions).

transfer order at issue was primarily a case management decision — a quintessential example of an area where the scope of discretion is broad.

It is hardly unusual to transfer asbestos cases to the Eastern District of Pennsylvania. Virtually all such cases are handled in this manner since the centralization decision of the Judicial Panel in 1991. *See In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). The order in this case was little more than a reaffirmation of the 1991 centralization. The order in this case represented the judgment of no less than six Panel members and was based on long experience in the proper management of the asbestos dockets of the federal courts. It is inconceivable that they all joined together to commit an abuse of discretion.

II.

THE FACTUAL GROUNDS ASSERTED IN SUPPORT OF THE PETITION ARE INCORRECT

A. The Question Has Been Improperly Framed

Pursuant to Supreme Court Rule 15(2), respondent objects to consideration of the question as framed by the petitioners because the three so-called "facts" on which it is based are not an accurate reflection of what occurred at the proceedings below. Petitioners have chosen to weave their argument into their statement of the case. That argument, however, has been tested and found wanting for factual reasons at numerous previous levels of judicial review in this case.

The "QUESTION PRESENTED" as framed by the petitioners in this matter is as follows:

> Whether the Judicial Panel on Multidistrict litigation may direct the transfer of cases pending in a federal district court even when:
>
> - those actions are already in trial;
>
> - the common questions of fact and law have already been resolved in a prior phase of the proceeding; and
>
> - any remaining discovery or other pretrial matters involve individualized questions of fact that plainly should not be conducted in the multidistrict context.

These factual predicates are either inaccurate or incomplete. The cases are more accurately described as "pretrial" than "in trial" status. There are many common questions of fact or law which have not been resolved in prior phases of these proceedings. There remains considerable discovery and other pretrial matters that do not involve individualized questions of fact.

The true question presented is whether it was an abuse of discretion to transfer these cases in light of their unique facts. More technically, the question is whether the United States Court of Appeals for the Third Circuit was correct in holding that the Judicial Panel on Multidistrict Litigation did not abuse its discretion. This is a classic example of the sort of question for which a writ of certiorari is not

appropriate. This Court does not sit to second guess the factual findings of courts of appeal when they hold that the Judicial Panel on Multidistrict Litigation has not abused its discretion in making a case management decision.

B. These Cases are in a Pretrial Status

The Judicial Panel characterized these cases as "again in a pretrial status". It is this characterization rather than that of the petitioners which is most accurate.

In *Cimino v Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998), the Fifth Circuit reversed all of these cases except the nine cases which were fully tried[7]. The Fifth Circuit pretermitted any consideration of claims of error as to the remainder. Although there is some dispute as to the manner thereof, there is no dispute that 2,271 cases remain to be tried. Although there is some dispute as to the extent thereof, there is no dispute that some discovery remains to be conducted. The Judicial Panel and the Third Circuit were eminently correct in characterizing the cases as being in a pretrial status.

C. There Are Many Common Questions of Fact or Law Which Have Not Been Resolved

1. Questions of Fact

The Third Circuit held that "There remain many common questions of fact in the *Cimino* cases". This holding was correct.

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7. The judgments in these nine cases have been fully satisfied.

Petitioners argue that there are no common questions of fact because the Phase I liability issues in *Cimino* have already been tried and apply to all the rest of the cases. This reasoning is incorrect for three reasons.

The Phase I findings do not apply to all the rest of the cases. The Fifth Circuit pretermitted consideration of this subject. At a minimum, this issue remains disputed.

Even assuming that the petitioners are correct as to the meaning of the Fifth Circuit's holding, there are many common factual issues of exposure, causation, and damages within the proceedings remaining to be conducted[8]. Most of these cases arise from refineries and shipyards where the environmental conditions were similar. This gives rise to numerous unresolved common issues such as exposure to the refinery and shipyard conditions, the damages factors relating thereto, the knowledge of the premises owners, the implementation of safety measures, the effect of other toxins, the impact of smoking, union knowledge and other similar information[9].

Finally, petitioners misconstrue the "common questions of fact" criterion. This criterion refers not to the similarity between issues in one case or group of cases but to the similarity between any one asbestos case and *all* asbestos cases. In its 1991 centralization order, the Panel properly

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8. In making this point, respondent does not disagree with petitioner that there are also many individualized questions of fact that need to be resolved.

9. There may be a greater realization of the impact of smoking now than in 1990.

determined that the criteria of 28 U.S.C. § 1407(a) were fulfilled and that there were sufficiently common issues among all asbestos cases that transfer to Judge Weiner of the Eastern District of Pennsylvania was appropriate. Among these were the large number of cases, the crowding of dockets, the length and delays of trial, high transactional costs, and the potential exhaustion of the assets of the defendants. *Cimino* has always shared and continues to share these characteristics. Indeed *Cimino* is a unique example of the disproportionate siphoning off of the assets of defendants to the Eastern District of Texas. The Panel correctly found that *Cimino* is appropriate for transfer today "for reasons expressed by the Panel in its original decision". Arguments *ab initio* against transfer on grounds of lack of commonality are thus unavailing. That issue was decided eight years ago.

2. Questions of Law

There are also important common questions of law yet to be resolved in these cases. The Third Circuit was correct to so note.

An example of an important unresolved legal question is the dispute between the parties as to whether liability and punitive damages issues remain to be tried. The petitioners maintain that the Fifth Circuit spoke to these issues and that only exposure and certain damages issues remain. The respondent maintains that the Fifth Circuit reversed outright the sample and extrapolation cases, pretermitted consideration of the disputed issues involving the remainder, and that its opinion has no effect outside the nine trial cases which were affirmed. The resolution of this issue will have

important ramifications for the future of these cases[10]. Another important unresolved common question of law is whether the class certification was proper. This was one of the issues respondent reserved on appeal to the Fifth Circuit. It was not necessary for the Fifth Circuit to reach this issue but it may be necessary to do so in the future. Yet another unresolved legal issue is a venue challenge based on the prejudicial publicity of the billion dollar award in a relatively small community.

D. There Remains Considerable Discovery and Other Pretrial Matters That Do Not Involve Individualized Questions of Fact

The defendants' opportunities for discovery at the time of trial were severely curtailed by the District Court's 1989 orders which contemplated a statistical sampling procedure rather than a real trial. As noted previously, only three months

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10. The parties also dispute whether the ruling on this subject by the United States District Court for the Eastern District of Texas is the law of the case. Respondent maintains that it is not. A transferee judge may reconsider decisions of the transferor judge. *See* Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 577 (transferee judge may "modify, expand, or vacate prior orders of transferor court"); Wright, Miller, and Cooper, *Federal Practice and Procedure*, 1999 Supp., p. 876, § 4478: ("Following transfer of a case for consolidated multi-district proceedings under 28 U.S.C.A. § 1407, on the other hand, the underlying purpose of coordination and consolidation may justify special freedom to reconsider matter that otherwise might be the law of the case."); *In re Multi-Piece Rim Products Liability Litig.*, 653 F.2d 671, 676 (D.C. Cir. 1981) (transferee judge "has the power to set aside pretrial rulings of transferor courts"). Fed. R. Civ. P. 54(b) provides that a non-final decision is subject to revision at any time.

were allowed for discovery in over two thousand cases. Depositions were limited to 45 minutes per plaintiff. The defendants were required to bring medical personnel to Beaumont to examine approximately 100 plaintiffs per day. This limited discovery was not adequate to fairly evaluate the claims of all the plaintiffs or to prepare the issues for trial. It is thus not correct (as the petitioners claim) that the discovery still needed is limited to updated medical records or individual exposure data. There is a need for discovery on common issues such as the conditions at the refineries and shipyards, knowledge of premises owners and operators, the effects of other toxins, union knowledge and other similar matters. The sheer volume and complexity of what remains to be done suggests that it is likely that there will be other pretrial matter that does not involve individualized questions of fact.

III.

THE LEGAL GROUNDS ASSERTED IN SUPPORT OF THE PETITION ARE WITHOUT MERIT

Petitioners assert one theme and three specific arguments for granting the writ. All are without merit.

A. The Judicial Panel on Multidistrict Litigation Did Not Engage in an "Unprincipled Expansion" of its Power in This Case.

As their "central theme" in this case, petitioners assert that there has been an "unprincipled expansion of judicial power by the Judicial Panel on Multidistrict Litigation" (Petition, page 15). No authority has been cited in support of this proposition other than petitioners' dissatisfaction with

the result in this case. It is true that MDL treatment is appropriate only for pretrial proceedings. That is exactly what the Panel properly held these cases to be. Petitioners' theme also conveniently ignores the fact that both the Panel and the Third Circuit took special note of the procedures available for remand of individual cases should continued inclusion in MDL proceedings be deemed inadvisable.

Petitioners also assert that the decisions in this case conflict with *Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach*, 523 U.S. 26, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998) (Petition, page 16). In *Lexecon*, this court held that an MDL transferee judge may not assign a case to himself for trial. This case involves a decision to transfer by the MDL Panel. It does not involve a decision of the transferee judge to assign a case to himself for trial. The Third Circuit took special note of *Lexecon* in its opinion. *Lexecon* has no applicability to the case at bar.

B. The Third Circuit Decision Did Not Conflict With Other Decisions

Petitioners assert that the Third Circuit decision "conflicts with numerous other decisions in the lower courts" (Petition, pages 16-25). No claim is made that there is a conflict among the circuits on the same important matter. In fact, no such conflict exists.

The principal factual predicate for this "conflict" claim is that all the common issues have already been decided. The Third Circuit is said to have "ignored these considerations" (Petition, page 18). The Third Circuit did not ignore these considerations. It expressly and correctly found that there remained many common issues of causation

and damages. It expressly took note of the vigorous dispute between the parties as to whether the trial court's determination on liability, warning, and punitive damages are binding on the entire class. To the extent that the petitioners' "conflict" claim rests on this factual predicate, it may be rejected on a threshold basis because the factual predicate is wrong.

Petitioners argue that the Third Circuit's decision conflicts with its own prior decision in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997) (Petition, page 19). Even if petitioners were correct, this would be a conflict within a circuit rather than a conflict between the circuits. But *Georgine* has nothing to do with the issues in this case. *Georgine* held in essence that class action certification rules may not be violated merely because it is a settlement rather than a litigation class. The Panel in this case did not pass on class certification. This case does not involve a settlement class. Petitioners also quote language from *Georgine* as well as respondent's prior papers in this case for the proposition that liability is generally regarded as a common issue whereas exposure and causation are generally regarded as individualized issues (Petition, page 19). These propositions are true but they do not advance the petitioners' case. Under a proper reading of the Fifth Circuit's opinion and its pretermission language, the common issues of liability have *not* yet been decided in the remaining *Cimino* cases. Even if these issues are regarded as having been decided, there remain common issues of causation and exposure. The fact that causation and exposure are individualized issues as to a particular plaintiff in a particular case does not mean that there are not areas of commonality in over two thousand cases of people (or various subgroups thereof) many of whom worked in the

same shipyards and refineries. Finally, the "common questions of fact" criteria of 28 U.S.C. § 1407(a) refers not so much to issues within a single case but to commonality between that case and all asbestos cases. The *Georgine* case is no authority whatsoever for the petition here.[11]

The petitioners rely on a catalogue of twenty eight cases (Petition, pages 20-25). The decisions of the Third Circuit and the Panel are said to "fly in the face" of these cases (Petition, page 20). *All* of them are prior decisions of the Judicial Panel on Multidistrict Litigation — the same body that is asserted to have abused its discretion here[12].

Five of the twenty eight cases are cited for the proposition that transfer should be denied when individualized issues predominate over common issues[13]. All

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11. The difficulties with class actions as pointed out in such cases as *Georgine* and *Ortiz v. Fibreboard*, 119 S. Ct. 2295 (1999) may make MDL proceedings more attractive. *See* 17 Moore's Federal Practice, 3d ed. § 112.02[2] in which it is suggested in a discussion which included a reference to *Georgine* that "multidistrict consolidation and transfer provisions have proven to be a useful alternative to class actions that could not otherwise proceed."

12. The purpose of the writ of certiorari is to resolve conflicts among the *circuits*. It is not the purpose of certiorari to re-examine fact specific differences between various JPML transfer decisions.

13. *In re Asbestos Schools Prods. Liab. Litig.*, 606 F. Supp. 713, 714 (J.P.M.L. 1985); *In re Deering Millikan Patent Litigation*, 476 F. Supp. 461, 464 (J.P.M.L. 1979); *In re United Gas Pipe Line Co. Litig.*, 391 F. Supp. 774, 776 (J.P.M.L. 1975); *In re Grand Funk Railroad Trademark Litig.*, 371 F. Supp. 1084, 1085 (J.P.M.L. 1974); *In re Air Crash Disaster Near Silver Plume*, 368 F. Supp. 810, 811 (J.P.M.L. 1973).

of these are original transfer denials by the Panel. They are highly fact specific and have virtually no relationship to *Cimino* — a "tag along" asbestos case. The original decision to transfer all asbestos cases was made eight years ago.

The remaining twenty three cases are cited for the proposition that transfer should be denied when the proceedings in the transferor court are well advanced. Sixteen of these cases involve original transfer denials and are thus dissimilar to *Cimino* for the reasons stated above[14]. Only six cases involved "tag along" situations and they are easily

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14. *In re Dow Chem. Co. "Sarabond" Prods. Liability Litigation*. 650 F. Supp. 187 (J.P.M.L. 1986); *In re Asbestos Schools Prods. Liab. Litig.*, 606 F. Supp. 713, 714 (J.P.M.L. 1985); *In re Rely Tampon Prod. Liab. Litig.*, 533 F. Supp. 1346, 1347 (J.P.M.L. 1982); *In re Ecuadorian Oil Concession Litigation*, 487 F. Supp. 1364, 1368 (J.P.M.L. 1980); *In re Insulin Mfg. Antitrust Litigation*, 487 F. Supp. 1359, 1361 (J.P.M.L. 1980); *In re Cable Tie Patent Litigation*, 487 F. Supp. 1351, 1354 (J.P.M.L. 1980); *In re Chiropractic Antitrust Litigation*, 483 F. Supp. 811, 813 (J.P.M.L. 1980); *In re McDonald's Franchise Antitrust Litigation*, 472 F. Supp. 111, 114 (J.P.M.L. 1979); *In re Womens' Clothing Antitrust Litigation*, 455 F. Supp. 1388, 1390 (J.P.M.L. 1978); *In re Ortho Pharmaceutical "Lippes Loop" Prods. Liability Litigation*, 447 F. Supp. 1073 (J.P.M.L. 1978); *In re Raymond Lee Organization, Inc. Secs. Litigation*, 446 F. Supp. 1266 (J.P.M.L. 1978); *In re Allen Compound Bow Patent Litigation*, 446 F. Supp. 248, 250 (J.P.M.L. 1978); *In re Helicopter Crash Near Cameron, Louisiana, on April 23, 1976*, 443 F. Supp. 1022, 1023 (J.P.M.L. 1978); *In re Southern Ry. Employment Practices Litigation*, 441 F. Supp. 926, 927 (J.P.M.L. 1977); *In re Westinghouse Elec. Corp. Employment Discrimination Litigation*, 438 F. Supp. 937, 939 (J.P.M.L. 1977); and *In re Luminex Int'l Prods. Liab. Litig.*, 434 F. Supp. 668, 669-670 (J.P.M.L. 1977).

distinguishable[15]. The last case is *In re Asbestos & Asbestos Insulation Material Prods. Liability Litigation*, 431 F. Supp. 906 (J.P.M.L. 1977). This decision is of no value whatsoever as it was effectively overturned and rendered moot by the Panel's decision thirteen years later in 1991. All of these cases are highly fact dependent[16].

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15. Transfer was denied in the Dalkon Shield cases because pretrial proceedings in the transferee district were either no longer active or "near an end", *In re A.H. Robins Co., "Dalkon Shield" IUD Prods. Liability Litigation*, 505 F. Supp. 221 (J.P.M.L. 1981) and 570 F. Supp. 1480 (J.P.M.L. 1983). In the *Midwest Milk Monopolization Litigation*, transfer was denied either because pretrial activities in one case in the transferor district were nearly completed and trial was imminent [441 F. Supp. 930 (J.P.M.L. 1977)] or because pretrial proceedings had been completed in the lead action in the transferee district and the lead action had been on trial for over two years [483 F. Supp. 823 (J.P.M.L. 1980)]. In *In re Four Seasons Sec. Laws Litig.*, 362 F. Supp. 574 (J.P.M.L. 1973), transfer was denied because discovery was completed in the transferor district. In *In re Motion Picture Licensing Antitrust Litig.*, 479 F. Supp. 581 (J.P.M.L. 1979), transfer was denied for complicated and unique reasons arising from the fact that discovery and pretrial proceedings were well advanced in the transferor district and the parties lacked interest in the common issues in the transferee district.

16. There is one case which is factually similar and which *does* support the transfer decision. *See Wilson v. Johns Manville Corp.*, 107 F.R.D. 250 (S.D. Tex. 1985), *aff'd on other grounds*, 810 F.2d 1358 (5th Cir), *cert. denied*, 484 U.S. 828, 108 S. Ct. 97 (1987), a large asbestos case consolidation which was transferred to Judge Weiner after trial and appeal on some issues but before the majority of individual cases were adjudicated. The pages of the docket sheet in *Wilson* indicating the MDL transfer were attached as an Exhibit in the record of this case in the Third Circuit. For an additional procedural ruling in *Wilson*, *see* 873 F.2d 869 (5th Cir. 1989).

There is no meaningful conflict between any other case and the Third Circuit and Panel decisions in this case. There is especially no conflict of sufficient importance to warrant the exercise of jurisdiction by this court.

C. The Third Circuit Decision Did Not Create a "Jurisdictional Conflict With the Eastern District of Texas"

Petitioners argue that the Third Circuit decision "pulled the rug out" from the Eastern District of Texas which had been preparing to try these cases; that the Third Circuit sustained its holding only by "directly repudiating" the Eastern District's decision on the preclusive effect of the Fifth Circuit's opinion; that no constructive purpose will be served by transferring these cases to the Eastern District of Pennsylvania (the MDL transferee court); that the convenience of the parties will not be served because the evidence is in Texas; and that neither justice nor judicial economy will be served by transferring these cases which have already lasted so long (Petition, pages 26-27). None of these arguments are meritorious.

The transfer order did not "pull the rug out" from the Eastern District of Texas. The District Court in Texas knew full well that MDL transfer proceedings were pending when it entered its Case Management order. After the decision of the Fifth Circuit on August 17, 1998, the Panel was notified of the status of the cases by letter dated October 21, 1998. The conditional transfer orders were entered on November 25, 1998. The Case Management Order of the District Court in Texas was dated one week later on December 2, 1998. That order made express reference to the pendency of the MDL proceedings and acknowledged that the Panel will have

to make a decision as to whether to transfer the cases. The final transfer decision was made on February 5, 1999. If the District Court in Texas was concerned about interference with its plans for trial preparation, it would have been a simple matter to wait for the Panel's transfer decision. This case did not "pull out the rug" any more than *any* MDL transfer.

The Third Circuit did not "directly repudiate" the prior decision of the Eastern District of Texas. At footnote 2 of its opinion, the Third Circuit expressly noted the vigorous dispute between the parties over whether the Eastern District's holding was the "law of the case" and concluded that it did not need to resolve that issue because transfer was otherwise appropriate.

Petitioner's argument that the convenience of the parties will not be served because the evidence is in Texas is a misstatement of the law. It well settled that the Panel looks not to the ease of travel and location of evidence in one case but to the more global questions of convenience in the litigation as a whole. *See* 17 Moore's Federal Practice, 3d ed. § 112.04[1][c] ["the Panel views the question of convenience from the group perspective rather than from the point of view of any one party or witness"]; *In re Sugar Industry Antitrust Litigation (East Coast)*, 471 F. Supp. 1089, 1094 (J.P.M.L., 1979); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 299, 304 (S.D.N.Y. 1971). The Panel anticipated and addressed this precise issue in its 1991 decision, *In re Asbestos Liability Litigation (No. VI)*, 771 F. Supp. 415, 422 (J.P.M.L. 1991). The Third Circuit was correct to so hold.

Finally, petitioners argue that neither justice nor economy will be served by transfer. They characterize the transfer as a "delaying tactic" proposed by the defendant in response to pressure brought by the Eastern District of Texas to resolve these cases in a quick and expeditious manner (Petition, page 27). This argument represents a singularly one-sided view of justice and economy.

The question of whether a particular form of trial management serves justice and economy is highly subjective and factually individualistic in nature. Any evaluation of the justice and economy by which the Eastern District of Texas has historically managed these cases might well take into account the fact that *Cimino* trial plans have twice been invalidated by the Fifth Circuit on the grounds that they have acted outside the powers of the judiciary. In the view of the respondent, the not quite so just purpose of the *Cimino* plan was to so raise the stakes for defendants that settlements on plaintiffs' terms would become inevitable[17]. This was done by aggregating large numbers of cases, front loading the trial with punitive damages evidence and various evidentiary rulings which exaggerated the damages impact in individual cases. It was thus little surprise that *Cimino* produced what Judge Hogan's dissent in the Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (Asbestos Committee Report) referred to as the "untoward results" of half million dollar verdicts in pleural cases when the same cases in most jurisdictions would merit only a few

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17. Almost all the original defendants in *Cimino* settled long ago with large payments to the plaintiffs — a phenomenon that should temper the present suggestion that justice delayed is justice denied.

thousand dollars[18]. The reason these cases have lasted so long is that the plaintiffs have been unwilling to relinquish the extraordinary windfall which the one-sided nature of the now reversed trial plan conferred on them. If the *Cimino* cases had been handled in a more conventional manner, they would have been disposed of long ago. Of all cases in the nation, *Cimino* is one of the least eligible for an exception to the MDL centralization regime on justice and economy grounds.

D. The Third Circuit Did Not Approve the Use of "Impermissible Factors as Reasons for Transfer"

Petitioners finally argue that the Third Circuit improperly made a reference to settlement in its transfer decision (Petition, pages 27-28).

This argument is a red herring. Petitioners have mischaracterized what the Panel actually said, incorrectly assumed that the transfer order deviated from the statutory standard, and mistakenly implied that settlements may not be an aspiration of MDL proceedings.

Petitioners imply that the Panel affirmatively and improperly utilized considerations of settlement in other cases to "interfere" with the progress of this case (Petition, page 27). That is not what the Panel said. The Panel's reference to settlement efforts was not an action-forcing rationale of its own but merely an identification of one of several issues which were either disputed by the parties or

18. In the proposed settlement class in *Georgine* (a settlement supported by some of the same attorneys representing the *Cimino* plaintiffs), pleural claims would receive *no* compensation. *See Georgine v. Amchem Products Inc.*, 83 F.3d 610, 620 (3d Cir. 1996).

which affected the overall management of the litigation. Having made this statement, the Panel went on to hold that Judge Weiner should be given an opportunity to review these elements and that remand procedures were fully available through MDL rules should this course of action prove advisable. Petitioners have attributed an "interference" motive to the Panel decision which is simply not there.

Petitioners have also incorrectly asserted that procedural rules have been "bent simply to promote settlements" (Petition, page 28)[19]. The Panel decision did not "bend" anything. The Panel's transfer decision was fully consistent with the transfer standards of 28 U.S.C. § 1407(a) and otherwise a totally proper exercise of managerial discretion.

Petitioners further appear to imply that settlements may not be a legitimate aspiration of MDL proceedings. This is a curious argument and one which should elicit disfavor from this court. One of the MDL 875's greatest successes is the large number of settlements it has produced in asbestos cases. Given the long history of *Cimino* and the fact that over 2,000 cases remain unadjudicated, settlements might well be of considerable benefit to the plaintiffs. To the extent that the Panel and/or the Third Circuit may have hoped that settlements become a product of the MDL process, their actions should hardly be the subject of rebuke by mandamus or certiorari.

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19. In support of this argument, petitioners cite the *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 625 (3d Cir. 1996). These decisions have to do with settlement classes. They have no applicability here where there has been no settlement class.

IV.

THESE CASES WERE PROPERLY TRANSFERRED UNDER 28 U.S.C. § 1407(a)

These cases were properly transferred pursuant to 28 U.S.C. § 1407(a).

A. The Cimino Case is a Paradigm for Multidistrict Proceedings

The Panel decision in this case was essentially a reaffirmation of its 1991 decision that all asbestos cases should be centralized in multidistrict proceedings. *See In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). The Panel's 1991 decision relied heavily on the Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (Asbestos Committee Report). The Asbestos Committee Report repeatedly refers to the *Cimino* case by name as an example of the problems of asbestos litigation. There were many problems which gave rise to both the *Cimino* plan and the MDL centralization order. These include large numbers of cases, crowded dockets, complexity of issues, high transactional costs, repetitive liability evidence, and the potential exhaustion of the assets of the defendants.

Cimino, in short, is not a "case" in the traditional sense at all. Rather, it is a collection of thousands of cases and an experimental case management plan which has been twice overturned because it was beyond the powers of the judiciary. To the extent the *Cimino* plan is an attempt to "manage" asbestos cases, however, the Panel was well within its discretion to decide that multidistrict management

proceedings are appropriate, proper, and preferable. The Panel may well have been aware of *Cimino* when it entered its original centralization order in 1991 and it was undoubtedly exercising its proper management function when it held that what was left of the *Cimino* plan after the recent Fifth Circuit opinion belonged in the MDL. As such, *Cimino* is a paradigm for multidistrict proceedings. Any use of mandamus power to undercut the Panel's recent transfer order would be a serious blow to the 1991 centralization order itself and the procedure that has evolved to handle the asbestos docket in the federal courts for the last eight years.

B. The Cimino Case Meets the Standards for § 1407 Transfer

Under 28 U.S.C. § 1407(a), cases are appropriate for transfer when they involve one or more common questions of fact and transfer is determined to be for the convenience of the parties and the witnesses and will promote the just and efficient conduct of such actions. These criteria were met in this case. *Cimino* was a classic "tag-along action".

There are common questions of fact. If the respondents are correct about the meaning of the Fifth Circuit opinion, there are common issues of liability as well as causation and damages. If the petitioners are correct about the meaning of the Fifth Circuit opinion, there are many common issues of exposure and damages. There are certainly common features between the *Cimino* case and all the other asbestos cases which are routinely handled through MDL proceedings.

Transfer will serve the convenience of the parties and the witnesses. The convenience standard is applied to the litigation as a whole. The convenience standard was held to have been met in asbestos cases a long time ago.

Finally transfer will promote the just and efficient conduct of the litigation. This is a fact intensive inquiry which the Panel decided eight years ago and the Panel and the Third Circuit recently reiterated in this case. Judge Weiner's stewardship has resulted in the closing of 60,000 cases and the return of 1,000 to transferor districts. Mandamus should hardly be the response to this record of success.

CONCLUSION

The petition for writ of certiorari should be denied for all the above reasons. The writ of certiorari does not exist for the purpose of second guessing the factual basis of the lower courts when determining whether there has been an abuse of discretion in MDL transfers.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CLAUDE CIMINO, ET AL.,

Petitioners,

v.

PITTSBURGH CORNING CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In the Petition for Certiorari, Petitioners Claude Cimino, *et al.* demonstrated that this Court's plenary review is urgently needed to address the confusion and conflicts created by the decision below and to reaffirm the fundamental statutory limits on the ability of the Judicial Panel on Multidistrict Litigation to order the transfer of cases already in trial in which the common questions of fact and law have already been resolved.

1. Pittsburgh Corning's chief argument in its Brief in Opposition is that the Petition for Certiorari presents only "the factual questions of whether there remain 'common issues' to be tried, whether the cases are once 'again in a pretrial status,' and whether or not transfer serves the convenience of the parties and witnesses and is conducive to judicial efficiency." Opp. Cert. 9.

That is flatly wrong. The Eastern District of Texas has held that the "common issues" have been resolved by the Phase I findings and that the cases are *not* in a pretrial status. The Eastern District of Texas held that "the opinion by the Appeals Court did approve of the phase I class-wide determination of issues of product defectiveness, warning, and a punitive damages multiplier." App. 12a. "Because the phase I class-wide findings were not disturbed by the Court of Appeals' decision, what remains for this court are shortened mini-trials on causation and damages in 2,218 cases and on causation and perhaps damages [i]n 143 cases. *The phase I or liability part of the trial of all of these cases has been completed.*" App. 13a (emphasis added).

Indeed, elsewhere Pittsburgh Corning acknowledges that the Eastern District of Texas has resolved these issues. Opp. Cert. 5. Pittsburgh Corning is simply trying to re-litigate before this Court matters which have been decided by the Texas district court. Thus, Chief Judge Becker indicated that he would have granted rehearing of the Third Circuit's decision, on the ground that "the Judicial Panel on Multidistrict Litigation abused its discretion in determining

that there were common questions of fact whose resolution would be served by the transfer of the *Cimino* cases to the transferee court." App. 16a-17a n.2. He opined that "the only causation questions remaining [are] those relating to individual damages determinations." *Id.*

The Third Circuit purported to identify open "issues of causation" with respect to some of the plaintiffs and "additional questions of damages with respect to damages" with respect to other plaintiffs. App. 6a. But as already noted in the Petition for Certiorari (with no contradiction by Pittsburgh Corning) any additional discovery that may be needed, such as "updated medical records" for damages (App. 14a), or individual exposure data relating to causation, will not involve any issues in common with asbestos cases consolidated in the Eastern District of Pennsylvania. Any further discovery that may be needed in this proceeding will relate to individualized questions and should be pursued in Texas, not in Pennsylvania.

In fact, Pittsburgh Corning goes to great lengths to complain that discovery in these cases entails inconvenient trips "to Beaumont Texas to examine approximately 100 plaintiffs per day." Opp. Cert. 1. Pittsburgh Corning also insists that discovery must be undertaken into conditions at local "refineries and shipyards" in Texas. Opp. Cert. 13. *See also id.* at 18 (it is "true" that "exposure and causation are generally regarded as individualized issues"). Obviously, such discovery should be pursued in the Eastern District of Texas, not in Philadelphia.

2. Pittsburgh Corning suggests that the Third Circuit was free to repudiate the holding of the Eastern District of Texas because, as a technical matter, "[a] transferee judge may reconsider decisions of the transferor judge." Opp. Cert. 15 n.10. But the MDL process is not a substitute for appeal (in this case, to the Fifth Circuit) or a mechanism for collateral attack on a federal district court order. As these cases come to this Court (and as they came before the Judicial Panel), the

Eastern District of Texas Order has not been set aside. Under that Order, it is impossible to find that there are any common questions of fact; that transfer would serve the convenience of parties and witnesses; or that transfer would promote the just and efficient conduct of the litigation.

Pittsburgh Corning's argument only *proves petitioners' point*. Pittsburgh Corning has sought and supported transfer as a thinly veiled attempt at forum shopping. Dissatisfied with the Eastern District of Texas' holding that the common issues have been decided by the Phase I jury verdicts, Pittsburgh Corning wants another bite at the apple in the Eastern District of Pennsylvania.

The transfer in this case precipitated an unseemly jurisdictional tug-of-war between the Eastern District of Pennsylvania and the Eastern District of Texas. According to the Texas district court, "[t]he phase I or liability part of the trial of all of these cases has been completed." App. 13a. According to the Third Circuit, the cases are in a "pretrial" posture. App. 3a. Transfer was ordered after the Texas district court had issued a case management order to resolve these cases promptly through mini-trials beginning in May 1999. It is now more than six months later, with no end in sight. For Pittsburgh Corning to defend the transfer on the ground that the Third Circuit was entitled to thumb its nose at the Eastern District of Texas only heightens the need for this Court's review.

Law of the case is a doctrine that precludes the relitigation of issues within the context of a single case once they have been decided, in the absence of extraordinary factors such as an intervening decision of a higher court, newly available relevant evidence, clear legal error, or manifest injustice. *See Messinger v. Andersen*, 225 U.S. 436, 444 (1912); *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 165 (3d Cir. 1982). These principles have *more* force, not *less*, in the transfer context. "[J]udges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other." *Hayman Cash Register*, 669 F.2d at

168 (quoting *TCF Film Corp. v. Gourley*, 240 F.2d 711, 713 (3d Cir. 1957)).[1]

As one court has explained:

> The rule of the law of the case is a rule of practice, based upon the sound policy that when an issue is once litigated and decided, that should be the end of the matter.... This principle is particularly applicable to multidistrict litigation in which the presence of a large number of diverse parties might otherwise result in constant relitigation of the same legal issue. Nor is there any apparent reason why the rule of the law of the case should not be applied merely because a different judge has now been assigned to this litigation.

Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp., 323 F. Supp. 381, 383 (E.D.Pa.1970). *See also In re Penn Central Sec. Litig.*, 62 F.R.D. 181, 187 (E.D. Pa. 1974) (enforcing transferor court's order requiring pleading that transferee court believed was unnecessary); *In re Master Key Antitrust Litig.*, 320 F. Supp. 1404, 1407 (J.P.M.L. 1971) ("the parties will, of course, be expected to comply with all orders entered prior to transfer");

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[1] *See also Crane Co. v. American Standard, Inc.*, 603 F.2d 244, 248 (2d Cir. 1979) (quoting *Zdanok v. Glidden Co.*, 327 F.2d 944, 953 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964)) (law of the case eliminates the potential unseemliness of a court altering a legal ruling as to the same litigants with the danger that this may reflect only a change in the membership of the tribunal); *Stevenson v. Four Winds Travel, Inc.*, 462 F.2d 899, 904-05 (5th Cir. 1972) (rule that successor judge should not overrule her predecessor's decisions is essential to respectable administration of the law, to speed conclusion of litigation and to prevent unseemly conflicts); *Hardy v. North Butte Mining Co.*, 22 F.2d 62, 63 (9th Cir. 1927) (quoting *Appleton v. Smith*, 1 Fed. Cas. 1075, No. 458) ("It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence."); *In re Plantation Manor Restaurant*, 45 Bankr. 229, 231 (Bankr. E.D. & W.D. Ark. 1984) ("the reversal of one coordinate judge by another can only stultify the law and cheapen the judicial process").

ABC Great States, Inc. v. Globe Ticket Co., 316 F. Supp. 449, 451 (E.D.Pa.1970) (applying law of the case in § 1407 context).

The very cases cited by Pittsburgh Corning note that "[t]he doctrine of the law of the case has its application in multidistrict litigation as well as in traditional litigation." *In re Multi-Piece Rim Products Liability Litig.*, 653 F.2d 671, 678 (D.C. Cir. 1981). The authorities cited by Pittsburgh Corning involve a transferee judge's ability to take changed circumstances into account in the management of discovery. But there are no changed circumstances warranting the re-examination of the holding by the Texas district court that the Phase I jury findings conclusively resolved the common issues in this proceeding.

3. Even absent law of the case, it is plain that the December 2 Order of the Eastern District of Texas is correct. Pittsburgh Corning's position is that Phase I of the *Cimino* trial plan resolved only the claims of ten class representatives and produced no class-wide findings applicable to all plaintiffs. That is false. In *Cimino v. Raymark Industries,* 151 F.3d 297 (5th Cir. 1998), the Fifth Circuit held that Phase I was not only "a complete jury trial of the entire individual cases of the ten class representatives," but "also *a class-wide determination* of issues of product defectiveness, warning, and punitive damages (including a multiplier as to each defendant)." *Id.* at 299-300 (emphasis added). The Court of Appeals reaffirmed (*see id.* at 302 & n.10) that Phase I was nothing more than the *class-wide* adjudication of liability issues it had approved in *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471 (5th Cir. 1986) ("common questions" would be "resolved *for the class*") (emphasis added), and *In re Fibreboard*, 893 F.2d 706 (5th Cir. 1990), where the Fifth Circuit approved "a single trial" for all plaintiffs on liability issues. 893 F.2d at 708. Thus, in *Cimino*, the Fifth Circuit affirmed the unanimous Phase I jury findings, declaring "we reject all of its [Pittsburgh Corning's] contentions on appeal

except that relating to the date on which prejudgment interest commences to accrue." 151 F.3d at 335. The court expressly rejected Pittsburgh Corning's complaint as to the punitive damage multiplier. *Id.* at 323, 329, 335.

The Fifth Circuit's reversal of the judgments in the Phase III sample cases and in the extrapolation cases says nothing about whether the Phase I findings are nonetheless applicable to those cases on remand. The judgments were reversed because no jury had considered exposure and causation, not because the liability findings were in any way defective. The only portion of the Fifth Circuit's decision to which Pittsburgh Corning can point is the court's statement that it would "pretermit" certain claims by Pittsburgh Corning "which related solely to some or all of the Phase Three cases or some or all of the extrapolation cases or solely to both." 151 F.2d at 321. But this statement refutes rather than supports Pittsburgh Corning's argument. The Fifth Circuit plainly did not reserve any issue regarding Phase I, but rather solely questions relating only to Phase III and the extrapolation cases, such as evidentiary issues concerning Dr. Selikoff's studies, 151 F.2d at 322, and claims of inflammatory argument by plaintiffs' counsel in Phase III. *Id.* The court expressly reached (and rejected) all claims of trial error that were necessary to sustain the Phase I findings.

Pittsburgh Corning's argument also ignores the numerous orders of the Eastern District of Texas making clear that the Phase I jury determinations of the class-wide issues would be binding on *all* plaintiffs and defendants, not simply on the class representatives. *See, e.g., Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 653 (E.D. Tex. 1990) (Phase I "resolve[d] all common issues," including "[t]he question of punitive damages *in the entire case* of the 2,298 class [members]") (emphasis added).[2]

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[2] On February 19, 1990, the district court certified a class under Fed. R. Civ. P. 23(b)(3) consisting of 2,298 plaintiffs with pending cases in the District. The Order of certification was directed to Phase I. *See* 2/19/90 Memorandum and Order at 12. On March 13, 1992, the district court

4. In its effort to relitigate the issues which have already been decided by the Eastern District of Texas, Pittsburgh Corning contends that there are many remaining common issues of fact which have not been resolved. That contention does not withstand scrutiny.

Pittsburgh Corning points to the following alleged "common questions" of fact: "the large number of cases, the crowding of dockets, the length and delays of trial, high transactional costs, and the potential exhaustion of the assets of the defendants." Opp. Cert. 14. But the Judicial Panel itself has rejected Pittsburgh Corning's argument. The Judicial Panel has opined that "the *only* questions of fact common to all actions relate to the state of scientific and medical knowledge at different points in time concerning the risks of exposure to asbestos." *In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 910 (J.P.M.L. 1977) (emphasis added). These questions have been resolved by the Phase I findings in these cases.

Pittsburgh Corning's argument proves far too much. Litigations involving lead paint, firearms, tobacco, fen-phen and Redux, just to name a few examples, are also characterized by a "large number of cases, crowding of dockets, length and delays of trial, and high transactional costs." If these general and vague "common questions" could justify consolidation, § 1407 could be used as a vehicle to move not only asbestos cases, but virtually all types of products liability and toxic torts cases, to the Eastern District of Pennsylvania.

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entered a Final Consolidated and Class Action Judgment explaining that "Phase I involved not only the trial of the ten (10) class representatives' cases on all issues, but also the determination of the common issues of state of the art and punitive damages. The Phase I jury, along with establishing punitive damage multipliers, specifically decided whether each asbestos-containing insulation product manufactured by each defendant was defective and unreasonably dangerous, the adequacy of warnings, the state of the art defense, and the fiber type defense." Judgment at 2.

Pittsburgh Corning further claims that "[t]here are also important common questions of law." Opp. Cert. 14. But as we noted in the Petition for Certiorari (with no disagreement from Pittsburgh Corning), § 1407(a) expressly refers to questions of "fact," not of *law*, and it would obliterate Congress' handiwork to hand the MDL panel a blank check to transfer cases on the basis of *legal* rather than *factual* similarities.

5. Therefore, these cases squarely present the question of whether the Judicial Panel on Multidistrict Litigation may direct the transfer of cases pending in a federal district court even when:

those actions are already in trial;

the common questions of fact and law have already been resolved in a prior phase of the proceeding; and

any remaining discovery or other pretrial matters involve individualized questions of fact that plainly should not be conducted in the multidistrict context.

On this question, the Third Circuit's judgment is squarely in conflict with numerous decisions in the lower courts, including literally dozens of decisions by the Judicial Panel itself. Pittsburgh Corning asserts that these decisions are "highly fact dependent." Opp. Cert. 21. But that is untrue. The Judicial Panel's own decisions establish, as Pittsburgh Corning elsewhere acknowledges, that "transfer should be denied when individualized issues predominate over common issues" and that "transfer should be denied when the proceedings in the transferor court are well advanced." Opp. Cert. 19, 20. As shown by the Eastern District of Texas' holding, those are precisely the circumstances here. The Third Circuit's decision cannot be reconciled with the settled principles recognized even by Pittsburgh Corning

The Third Circuit's judgment also conflicts with other cases in which the courts of appeals have used mandamus to correct abusive transfer orders. In *In re Food Lion, Inc.*, 73 F.3d 528 (4th Cir. 1996), for example, the court of appeals

exercised its mandamus power to direct the Judicial Panel on Multidistrict Litigation to retransfer certain remanded cases. The Fourth Circuit explained: "Our responsibility for the orderly and efficient administration of justice within this circuit is an adequate basis for the exercise of our power to order relief in the nature of mandamus directed to the Panel and to the district courts for both the District of South Carolina and the Eastern District of North Carolina." 73 F.3d at 532 n. 10. Similarly, mandamus is necessary here to protect interests in judicial economy and the fair administration of justice. *See also In re Warrick*, 70 F.3d 736 (2d Cir. 1995) (granting mandamus where reason for transfer of venue ("judicial efficiency") was inadequate and where district court did not consider interests of either the parties or the witnesses; transfer was a clear abuse of discretion, subject to correction by mandamus); *Sunshine Beauty Supplies, Inc. v. U.S. District Ct.*, 872 F.2d 310 (9th Cir. 1989) (mandamus issued to set aside a transfer order because the prejudice from erroneous transfer could not be corrected on appeal from the final order); *Varsic v. U.S. District Ct.*, 607 F.2d 245, 250-252 (9th Cir. 1979) (mandamus issued because review by appeal after a final judgment in New York could not remedy the severe burdens that the transfer would impose on the plaintiff).

6. Pittsburgh Corning argues that certiorari is inappropriate because the "transfer order at issue was primarily a case management decision — a quintessential example of an area where the scope of discretion is broad." Opp. Cert. 10. The same could have been said in *Lexecon v. Milberg Weiss Berhad Hynes & Lerach*, 118 S. Ct. 956 (1998), where this Court overturned an established practice by which the Judicial Panel permitted transferee courts to assign cases to themselves for trial. This Court noted that "federal courts have treated such transfers with approval, beginning [in 1971]." *Id.* at 961. Nonetheless, this Court put an end to what it deemed to be an abusive and self-aggrandizing exercise of MDL authority.

The same clear statement is needed by this Court in this context as well.

7. This Court's review is warranted for the separate reason that the Third Circuit approved the use of impermissible settlement considerations as a reason for transfer. The Judicial Panel on Multidistrict Litigation cited as factors justifying a § 1407 transfer "the impact that scheduling of trials in the Texas forum would have on MDL-875 settlement efforts, MDL-875 settlement funding and the timing of remand actions for trial." App. 10a. But there is no principled justification in the statute for transferring *one* set of cases in order to facilitate settlements in *another* set of cases.

Pittsburgh Corning offers no defense of the merits of the Judicial Panel's reasoning. Instead, Pittsburgh Corning denies that the Judicial Panel actually considered the possibility of settlement as a factor in its decision. Opp. Cert. 25. But the Judicial Panel expressly described settlement as one "of the factors relating to the question of 1407 transfer of these actions." App. 10a. This consideration of settlement was wholly illegitimate.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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